

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

IP-Enabled Services

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WC Docket No. 04-36

COMMENTS OF SBC COMMUNICATIONS INC.

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COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. and its affiliated companies (collectively, “SBC”) respectfully submit these comments on the Commission’s Notice of Proposed Rulemaking (“*NPRM*”) regarding IP-enabled services.^{1/}

INTRODUCTION AND SUMMARY

The Internet has thrived to date under the Commission’s well-established policy of regulatory restraint. In the Telecommunications Act of 1996, Congress formalized that policy by declaring that “[i]t is the policy of the United States” to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”^{2/} That policy of unregulation has unquestionably fostered the explosive development of the IP-enabled services that are the subject of this rulemaking. The market for such services is intensively competitive and characterized by extremely low barriers to entry. A wide variety of IP-enabled service providers — including facilities-based and non-facilities-based service providers, equipment manufacturers, backbone

^{1/} Notice of Proposed Rulemaking, *IP-Enabled Services*, WC Docket No. 04-36 (rel. Mar. 10, 2004) (“*NPRM*”).

^{2/} 47 U.S.C. § 230(b)(2).

providers, application providers, and others — compete to offer subscribers the newest innovations for the delivery of enhanced voice, data, and video services.^{3/}

In considering how to classify IP-enabled services and whether and how to regulate them, the Commission must be mindful that the success of this industry to date has been enabled by the Commission's long-standing "unregulatory" approach. Further, the Commission should remember that it is addressing a robust, functioning market — not one in need of being "fixed" by the government. Reflexively regulating this next generation of technology and services, which is poised to revolutionize the nation's communications marketplace, is not remotely necessary. Indeed, such regulation would affirmatively impede innovation, competition, and economic growth. Thus, as the Commission itself has recognized, it should "rely[] wherever possible on competition and apply[] discrete regulatory requirements only where such requirements are necessary to fulfill important policy objectives."^{4/} As SBC has explained in its pending petitions,^{5/} and as it discusses further in these comments, the Commission can achieve that result by exercising its jurisdiction to classify IP-enabled services as interstate information services and preempting all common carrier and similar state regulation of such services. After making this foundational determination, the Commission can exercise its Title II non-carrier-

^{3/} See generally Competition in the Provision of Voice Over IP and Other IP-Enabled Services, *IP-Enabled Services*, WC Docket No. 04-36, at 2-11 (filed May 28, 2004) ("VoIP Fact Report").

^{4/} NPRM ¶ 5; see also *infra* Background.

^{5/} See Petition of SBC Communications Inc. for a Declaratory Ruling Regarding IP Platform Services, WC Docket No. 04-36 (filed Feb. 5, 2004) ("SBC Declaratory Ruling Petition"); Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, WC Docket No. 04-29 (filed Feb. 5, 2004) ("SBC Forbearance Petition").

specific jurisdiction and its Title I ancillary jurisdiction to design narrowly tailored rules addressing specific public policy concerns implicated by these services.^{6/}

For the reasons set forth in SBC’s pending petitions concerning IP platform services, while such an approach is demanded as a matter of public interest, it also is required as a matter of law. From a jurisdictional perspective, IP-enabled services almost always use, include, or provide access to the Internet — and more specifically, the globally dispersed networks and facilities that compose the Internet. They therefore are categorically interstate communications and fall squarely within the Commission’s express Title I jurisdiction over such communications. Moreover, separating out an intrastate component of IP-enabled services would be commercially infeasible. Within the course of a single communication, packets travel with geographic unpredictability. And, because of the inherent portability of such services, only the end user may know whether a transmission is intrastate or interstate. Consistent with the Commission’s

^{6/} As discussed below in section IV, the Commission has jurisdiction to regulate the activities of communications providers under Title II and the other substantive titles of the Act. While much of Title II gives the Commission authority to regulate the economic behavior of “common carriers” as such (*e.g.*, the rates, terms, and conditions for the telecommunications services they provide), some overarching provisions of Title II grant the Commission jurisdiction to regulate services or functions regardless of whether the provider is a common carrier. For example, section 254(d) gives the Commission permissive authority to require universal service contributions from providers of interstate telecommunications. 47 U.S.C. § 254(d). Similarly, section 251(e) gives the Commission exclusive jurisdiction over the North American Numbering Plan. *Id.* § 251(e). SBC uses the term “Title II non-carrier-specific jurisdiction” to refer generally to these and other provisions of the Act that authorize the Commission to regulate *non-common carrier* services and activities. In addition, as discussed below in Section IV, the Commission has jurisdiction under Title I of the Act to regulate “communication by wire or radio,” so long as the exercise of that jurisdiction is “reasonably ancillary to the effective performance of the Commission’s various responsibilities.” *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). Accordingly, SBC refers to this grant of authority as the Commission’s “ancillary jurisdiction.”

historic practice, which it recently reaffirmed,^{7/} these circumstances permit the Commission to assert exclusive jurisdiction over IP-enabled services.

Just as the Commission's jurisdiction follows from the nature of IP-enabled services, so too does the proper regulatory treatment of such services. As explained in SBC's pending petitions, IP-enabled services — when properly defined to exclude services that merely use the IP backbone for transport — intrinsically offer subscribers the enhanced functionality available using the Internet, including the capability for manipulating and storing information. They accordingly are correctly viewed as “information services,” which the Commission has recognized are properly regulated under Title I. This determination will free IP-enabled services from legacy common carrier regulation and will thus promote Congress's vision of a “vibrant and competitive free market” for “the Internet and other interactive computer services.”^{8/} A finding that IP-enabled services are interstate information services will also resolve emerging uncertainty concerning the regulatory classification of IP-enabled services and provide the predicate for the Commission's consideration of several of the public policy issues addressed below. In those limited instances where the current version of a particular IP-enabled service might not fall squarely into the information service category, the Commission should forbear from Title II common carrier regulation in order to promote the technological innovation and competition that has helped the market for these services thrive and has brought social and economic benefits to American consumers and businesses.

^{7/} See Memorandum Opinion and Order, *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3320-21 ¶ 20 (2004) (“*Pulver Declaratory Ruling*”).

^{8/} 47 U.S.C. § 230(b)(2).

It is not enough, however, for the Commission merely to clarify that *it* will not subject IP-enabled services to legacy common carrier regulations designed in a different world for fundamentally different services. To ensure that government regulation does not distort or chill innovation and competition for IP-enabled services, the Commission should make clear that state-level common carrier regulation and certain other regulations would impose undue costs on providers of IP-enabled services and are thus inconsistent with Congress's free-market vision. The Commission is plainly authorized to preempt such regulations, and there is no room here for dual federal-state jurisdiction. Congress specifically charged the Commission with promoting a market for Internet-based services that is "unfettered by Federal or *State* regulation."^{9/} And for good reason: Congress understood that regulatory uncertainty is inimical to innovation and investment and that this concern would be greatly magnified if the Internet industry were exposed to regulation by 51 state public service commissions rather than a unitary federal policymaker. The Commission would undermine this unregulatory legacy if it now permitted the states to impose common carrier-type obligations or other requirements on IP-enabled service providers that would negate the federal policy of unregulation. As more and more states have begun to initiate proceedings to determine how to *regulate* VoIP and other IP-enabled services, it becomes increasingly critical for the Commission to take swift and clear action by assuming exclusive jurisdiction in this arena and expressly confirming its authority to preempt state common carrier regulation in particular and inconsistent state regulation in general.

In finding that IP-enabled services are Title I interstate information services that are presumptively exempt from Title II legacy common carrier regulation, the Commission would not relinquish authority to address various policy concerns relating to those services; in fact, a

^{9/} *Id.* (emphasis added).

determination that IP-enabled services are interstate information services is an essential predicate to the Commission's resolution of some of these issues. The Commission could address each of these concerns through its Title II non-carrier-specific jurisdiction, its Title I ancillary jurisdiction, and, in situations where IP-enabled services interact with the legacy circuit-switched telephone network (generally known as the public switched telephone network, or "PSTN"), its Title II jurisdiction over common carrier services. For example, the Commission can (and should) invoke its authority under Title II over access to the PSTN to establish appropriate intercarrier compensation rules when VoIP providers allow their subscribers to send and receive traffic to and from the PSTN. In addition, the Commission can rely on its Title II non-carrier-specific authority to address such issues as numbering, universal service, 911, and access for disabled persons.^{10/} And to the extent the Commission lacks authority under Title II to address any critical issues, it can rely on its ancillary authority under Title I.^{11/} Finally, declaring IP-enabled services to be (largely) unregulated information services under Title I would still leave undisturbed the Commission's Title II authority over legacy non-IP facilities and services used for PSTN-based telecommunications. The Commission not only can, but should, invoke these sources of authority to provide prompt solutions for the most urgent issues. In other cases, it would be sufficient for the Commission to declare its jurisdiction to oversee and monitor the IP-

^{10/} See, e.g., *id.* §§ 251(e)(1), 254(d), 251(e)(3), 255. Another fundamental issue raised by the advent of IP-enabled services is communications assistance for law enforcement. The Commission has wisely chosen to deal with that important issue in a separate proceeding devoted to addressing the unique needs of law enforcement, and SBC looks forward to participating in that proceeding. See U.S. Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration, Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act, Docket No. RM-10865 (filed Mar. 10, 2004); see also *NPRM* ¶ 50 n.158.

^{11/} 47 U.S.C. §§ 151, 152(a), 154(i).

enabled services market to determine whether a need for regulation exists, and to design regulatory solutions only when necessary.

While many of the issues that the Commission has raised in the *NPRM* are important, two key issues — in addition to the threshold issue of the proper regulatory classification of IP-enabled services as interstate information services — require immediate attention above all others: intercarrier compensation and access to numbering resources. First, the Commission should promptly resolve the current uncertainty regarding the intercarrier compensation obligations of IP-enabled service providers. In the long run, SBC expects that such uncertainty will be overtaken by creation of a unified intercarrier compensation regime. In the shorter term, however, the Commission should address the most pressing intercarrier compensation concern, which is access charge arbitrage. Access charges continue to play an important role in keeping telephone service affordable for tens of millions of residential and business customers. The Commission should clearly reaffirm that, under its *current* rules, IP-enabled service providers are not exempt from the obligation to pay access charges when they make use of the PSTN for purposes other than connecting with their *own* subscribers for the use of their own services. The Commission should also conclude that, going forward (and subject to the qualifications described herein), the applicable charges are interstate access rates, rather than intrastate access charges (or reciprocal compensation). Such a determination comports with the uniformly interstate nature of IP-enabled services, and also provides a stable and workable means of clarifying providers' obligations in this area pending the adoption of a unified scheme for intercarrier compensation generally.

The Commission should also immediately correct the distortion in its existing numbering rules that limits VoIP providers to certain network architectures in order to obtain numbering

resources from the North American Numbering Plan Administrator (“NANPA”) or the Pooling Administrator (“PA”). The current numbering rules have the practical effect of forcing VoIP providers to obtain numbers from ILECs or CLECs, thereby discouraging providers from directly interconnecting with tandem switches on par with other providers that have direct access to numbering resources. These rules are unnecessarily restrictive and inhibit the growth of VoIP services. VoIP providers that can satisfy basic criteria to demonstrate that they will use, rather than hoard, numbers should be entitled to direct access to NANP numbers, without the need to go through a LEC intermediary. And, while the Commission should monitor and address any numbering exhaust concerns presented by VoIP, such concerns would not be exacerbated by the type of direct access proposed by SBC, as discussed below in section VI.B.

Prompt resolution of these two issues, in addition to confirming the proper classification of IP-enabled services as interstate information services, is critical. Until these issues are satisfactorily resolved, investment and innovation in the market for IP-enabled services will be severely impeded. Thus, rather than attempting to address every issue raised in the *NPRM* simultaneously in a single omnibus order, SBC strongly encourages the Commission to act on at least these three issues as expeditiously as possible, but by no later than the end of the year.

Of course, the paramount importance of these issues in no way diminishes the critical need for the Commission to address the remaining public policy issues described below. For example, the Commission should assert jurisdiction to ensure that voice-capable IP-enabled services that interconnect with the PSTN can provide 911 access to emergency services. The industry is already voluntarily expending significant effort to develop the means for implementing 911 capability in an IP environment. Thus, the Commission should work closely with the industry to establish workable standards that can be implemented to ensure that

customers who use VoIP services, for example, will have similar 911 capabilities as end users on the PSTN. But the Commission should not adopt restrictive regulations because, in the long run, if the industry is afforded a flexible regulatory environment, the 911 capabilities of IP-enabled technology are likely to exceed current 911 capabilities.

The Commission should also reaffirm its commitment to the needs of people with disabilities by asserting its ancillary authority to ensure that IP-enabled services that interconnect with the PSTN provide the same types of access that Congress has required for telecommunications services and some information services, telecommunications equipment, and customer premises equipment. The IP revolution is a critical event in the development of the communications marketplace, and it would be wrong to deprive people with disabilities of the ability to realize the phenomenal potential of this transformative new medium. The Commission should continue its current course of extending, where appropriate, telecommunications relay services (“TRS”) funding for IP-enabled services that facilitate communications access for persons with disabilities. The Commission should also require IP-enabled service providers that interconnect with the PSTN to contribute to the federal TRS funding mechanism.

In addition, the Commission should reform its universal service policies to accommodate the explosive growth of IP-enabled services. The Commission has recognized that those who use and benefit from the PSTN, like IP-enabled service providers who interconnect with that network, should contribute to its support. In addition, as traffic migrates to IP-enabled services, the traditional telecommunications revenue base for universal service contributions will decrease and the contribution burden on legacy service providers will increase. The Commission should affirm its ability to broaden the contribution base to include IP-enabled service providers, and revisit this issue as necessary to ensure adequate and equitable universal service funding. The

Commission should also affirm its ability to authorize the use of universal service funding to support certain IP-enabled services where appropriate, at some later date in the future (though it should not act on that authority at present).

Finally, although the Commission has *authority* to employ its Title I ancillary jurisdiction to adopt consumer protection rules for all interstate communications services,^{12/} exercising it with respect to IP-enabled services would be redundant in light of existing protections. To the extent consumer protection issues arise in the market for IP-enabled services, they can be effectively dealt with through the normal application of non-communications-specific consumer protection laws, such as those addressing fraud. In addition, the thriving competition that already prevails in the IP marketplace, rather than regulation, is the best form of consumer protection. Thus, the Commission need not create special consumer regulations for IP-enabled services or import the consumer protection regulations that Congress tailored for customers of legacy services on the PSTN, such as the section 222 customer proprietary network information (“CPNI”) rules, which have never been deemed necessary for IP-enabled services. Finally, although the Commission should not impose the full suite of section 214 entry and exit rules on IP-enabled service providers, the Commission may want to consider requiring IP-enabled service providers to give at least some limited advance notice before they discontinue service to their customers.

In sum, by declaring that IP-enabled services are not subject to Title II common carrier regulation, the Commission can protect important policy goals, preclude the encroachment of

^{12/} See, e.g., Order on Reconsideration, *Promotion of Competitive Networks in Local Telecommunications Markets*, 32 Communications Reg. (P&F) 118 ¶¶ 7-8 (2004); Order, *2000 Biennial Review — Review of Policies and Rules Concerning Unauthorized Changes of Consumers’ Long Distance Carriers*, CC Docket No. 00-257 ¶ 9 (rel. May 4, 2004).

common carrier regulation into the IP sphere, maintain the nonregulated status quo for IP-enabled services, and accommodate with regulatory certainty the evolution of IP network technology, services, and applications.

BACKGROUND

In this proceeding, the Commission has undertaken the task of analyzing and categorizing IP-enabled services to determine their appropriate regulatory treatment. This requires the Commission to consider not only the technology underlying these services, but also how that technology has shaped the market for IP-enabled services. As explained below, the unique characteristics of IP technology have yielded a wide array of services and facilities that differ dramatically from those associated with the traditional circuit-switched network, a consequence that has direct bearing on how IP-enabled services should be regulated. While such services come in many shapes and forms, one fundamental point unites all of them: IP-enabled services exist in a highly competitive environment that promotes investment and innovation and protects the interests of consumers without any need for governmental intervention, except in very limited circumstances.^{13/} Indeed, the Commission recognized long ago that regulation could only harm these types of services as they began to emerge, and thus set an unregulatory course that made the IP revolution possible. As the Commission notes in the *NPRM*, IP-enabled services “have arisen in an environment largely free of government regulation, and the great majority, we expect, should remain unregulated.”^{14/} Congress shared this goal, and accordingly provided the Commission with the requisite authority to ensure the continuing success of IP-enabled services.

^{13/} The state of competition in the provision of IP-enabled services is described in detail in the VoIP Fact Report filed with the Commission on May 28, 2004.

^{14/} *NPRM* ¶ 35.

As the Commission recognizes at the outset of the *NPRM*, the technology underlying IP-enabled services is fundamentally different from that on which the traditional circuit-switched network is based.^{15/} The latter was originally designed for a single application: voice telephony. In fact, the very nature of circuit switching substantially limits its ability to support other types of services. Because a circuit-switched network dedicates a fixed amount of capacity (the circuit) for the duration of the communication regardless of whether information is being transmitted, it is normally an inefficient medium for the transmission of bursty data traffic. Moreover, the bandwidth of a circuit-switched transmission is typically quite narrow, which precludes its use for large quantities of information that must be sent simultaneously and continuously in real-time, such as video.

IP-based networks are free of these technical limitations, and in fact are capable of supporting a constantly expanding range of service possibilities.^{16/} The networks over which IP-enabled services are provided are specifically designed to handle huge quantities of information at high speeds and to transmit myriad communications of all types. The IP platform (in short, IP-based networks and their associated capabilities and functionalities) utilizes packet switching, in which all information — including voice, data, and video — is broken down into individual packets, each representing a portion of the message sent. Each packet is labeled with information that helps it arrive at its final destination — such as its originating and terminating endpoints and the number of packets that constitute the particular message. The packets then travel over different routes to their ultimate destination, where they are reassembled. The

^{15/} See, e.g., *id.* ¶ 4.

^{16/} See VoIP Fact Report at 23-24 (“The IP platform is widely viewed as much more flexible than the circuit-switched platform, because it enables new features to be developed and deployed much more quickly and efficiently.”).

emergence of the Internet Protocol — a common, open code that serves as the universal language of the Internet — has maximized these benefits of packetization by allowing communications to travel seamlessly across national and, more importantly, technological borders. The result is a platform that can support a far wider and more diverse range of services than is available over the circuit-switched network^{17/}:

- *First*, the universality of IP permits unprecedented interconnectivity among otherwise dispersed networks.
- *Second*, IP permits convergence of services that have traditionally been carried on different networks. Voice, data, and video can be unified by the language of IP, enabling them to be consolidated on a single network and transmitted simultaneously, with the packets commingled until they arrive at their respective destinations. Multiple applications can thus be offered concurrently and on a tightly integrated basis.
- *Third*, packetization, together with the continually improving labeling functions of packet networks, permits calls to be transported more efficiently. The network can distribute the individual packets making up a particular message across different paths, and can route them dynamically in ways that avoid problems in the network.
- *Finally*, the flexibility inherent in the IP platform gives end users unprecedented control over the services they receive. Customers can interact with stored data on a provider's network to customize their services to accommodate business, network, personal abilities, or other needs, integrating multiple applications as desired and according to their specific bandwidth and capacity requirements, in ways that are simply not possible over the circuit-switched network.^{18/}

The technology underlying the IP platform also has created market-based incentives to invest in and exploit these service possibilities. The IP platform is an overlay network, consisting of its own routers and IP-enabled facilities, that is separate and discrete from the

^{17/} See *id.* at 18 & tbl.5 (“[A]s industry analysts, competitive carriers, and equipment vendors now uniformly agree, VoIP provides comparable or superior quality and functionality to conventional circuit-switched service.”); see also *id.* at 34 tbl.6 (comparing features of VoIP and PSTN-based services).

^{18/} See *id.* at 24 (“Analysts expect an even wider array of features to be introduced in the future, as VoIP services become more integrated with data and video.”).

circuit-switched network and traditional Asynchronous Transfer Mode (“ATM”) and frame relay networks. In contrast to the circuit-switched network, the Internet is highly “modular,” in that particular providers can and do specialize in supplying services for different market segments, enabling *any* entity — including carriers, equipment manufacturers, software companies, and other “non-carriers” — to provide IP-enabled services, often over the networks of others.

As a result of this open architecture and independence from traditional legacy networks, the market for IP-enabled services is characterized by low barriers to entry and an absence of market power. For example, any entity that seeks to offer an IP-enabled service — such as VoIP — need only invest in relatively inexpensive call-management network equipment and certain customer premises equipment (“CPE”), which allow it to reach the continually growing number of consumers with a preexisting broadband connection.^{19/} As a result, diverse entities such as cable operators, traditional CLECs, interexchange carriers, and a new breed of IP-based providers — some of which own only the most minimal facilities — are now deploying IP-enabled services throughout the country.^{20/} Cable operators in particular have been aggressive in developing and deploying VoIP services.^{21/} For example, Comcast Corporation recently

^{19/} *Id.* at 11-13 (“The principal incremental equipment-related capital cost of adding VoIP service for a customer who already has a broadband connection is for relatively inexpensive CPE and call-management network equipment.”).

^{20/} *See generally id.* at 2-11 & tbl.1 (describing the types of providers that currently or plan to offer VoIP services); *see id.* at 25 (“A number of other IP-enabled services promise to exert competitive pressure on traditional networks and services. New video-over-IP services could provide much-needed competition to cable companies. IP-based services are also being successfully marketed to enterprise customers as substitutes for earlier generations of packet-switched services.”).

^{21/} *Id.* at 5 (“Since the beginning of 2004, each of the six major cable operators — whose networks reach 85 percent of U.S. households and serve 90 percent of all cable modem subscribers — has either begun commercial deployment of IP telephony service, or has announced plans to do so imminently. Many smaller cable operators have done so as well.”)

announced plans for a national rollout of VoIP that will enable it to provide phone service to all 40 million of its cable customers by the end of 2006.^{22/} These new services frequently cost less and provide greater functionality than traditional circuit-switched services.^{23/}

The success of IP-enabled services is no accident. Rather, it is the ultimate validation of the Commission's decision over twenty years ago to refrain from subjecting "enhanced services" to common carrier regulation under Title II. The Commission then recognized that introducing regulation into an emerging yet competitive market was unnecessary and, in fact, affirmatively harmful. As the Commission then explained, "[T]he absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network."^{24/} The Commission subsequently maintained this policy of regulatory restraint, noting that "[r]egulation often can distort the workings of the market by imposing costs on market participants which they otherwise would

(citations omitted); *id.* at tbl.1 (listing the cable operators that do or plan to offer VoIP and the status of that deployment).

^{22/} Peter Grant, "Comcast Pushes Into Phone Service," Wall St. J., at A3 (May 26, 2004); *see also* VoIP Fact Report at 6 (describing the plans of Comcast and other cable operators to offer VoIP services).

^{23/} *See* VoIP Fact Report at 14 (noting that "VoIP providers are now offering service at considerable discounts from circuit-switched service"); *see generally id.* at 11-20 (detailing the prices and service options available over various VoIP offerings as compared to those available over the PSTN).

^{24/} Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 387 ¶ 7 (1980) ("*Computer II*"); *see also id.* at 431-32 ¶ 123 (stating that subjecting enhanced services "to a common carrier scheme of regulation . . . would negate the dynamics of . . . this area").

not have to bear. . . . [T]he advent and growth of competition in a particular market eliminates the need for continued regulation.”^{25/}

Since that time, the Commission has repeatedly noted that it can “encourage investment and innovation by reducing regulatory obligations.”^{26/} In fact, the Commission has recognized that competition is generally superior to regulation as a means of promoting innovation and investment while protecting consumers:

Competitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production. Accordingly, where competition develops, it should be relied upon as much as possible to protect consumers and the public interest. In addition, using a market-based approach should minimize the potential that regulation will create and maintain distortions in the investment decisions of competitors as they enter local telecommunications markets.^{27/}

Government intervention is particularly undesirable with respect to the market for IP-enabled services, which is not only highly competitive but extremely dynamic. The Commission recognized the inappropriateness of regulating this highly dynamic market when it refrained from regulating the Internet backbone. As the Commission observed, “The technology and market conditions relating to the Internet backbone are unusually fluid and fast-moving, and we are reluctant to impose any regulatory mandate that relies on the persistence of a particular

^{25/} Report and Order, *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, 95 F.C.C.2d 1276, 1301 ¶ 38 (1983).

^{26/} Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 16999-17000 ¶ 22 (2003) (“*Triennial Review Order*”), vacated in part, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (quoting Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3705 (1999)).

^{27/} First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, 16094-95 ¶ 263 (1997) (“*1997 Access Charge Reform Order*”).

market model or market structure in this area.”^{28/} Regulation is incapable of keeping up with the rapid pace of transformative change that the Internet has brought to electronic communications generally.

In short, any attempt to impose regulation in this area would inevitably lag behind the newest developments and technological applications. That regulatory drag would discourage the innovation and new investment essential to the Internet’s growth. As Commissioner Abernathy has cautioned:

[I]t is important that we also act as technology facilitators — that is — we must recognize and reduce regulatory barriers to entry for emerging technologies through the adoption of policies that tap the benefits of emerging technologies. . . . [W]e should enact rules that allow free market forces to decide whether a particular technology succeeds or fails. In this manner, the market will dictate the success of technologies, not regulators.^{29/}

The Commission’s overarching challenge now is to preserve the favorable market conditions it has already created for IP-enabled services while ensuring that important public policy objectives are not forgotten in the wake of technological progress. It need not look far for the essential tools required to achieve this goal; Congress has already provided them in the Telecommunications Act of 1996. Congress formalized the Commission’s long-standing policy of regulatory restraint, finding that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”^{30/} To preserve and promote this success, Congress formally declared that it “is the policy of the United States” to “preserve the vibrant and competitive free market that presently exists for the Internet

^{28/} Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11535-36 ¶ 72 (1998) (“*Report to Congress*”).

^{29/} FCC Commissioner Kathleen Q. Abernathy, “The Importance of the Market,” 3G Americas Board Briefing (June 3, 2003).

^{30/} 47 U.S.C. § 230(a)(4).

and other interactive computer services, unfettered by Federal or State regulation.”^{31/} Congress further ensured that this unregulatory umbrella would have wide reach by defining the Internet broadly and inclusively, in a manner that must be understood to include IP-enabled services.^{32/}

At the same time that it affirmatively declared a policy of unregulation for these services, Congress specified certain key goals and functions in Title II for the Commission to undertake without limitation to the “common carrier” status of a service provider (*e.g.*, universal service and administration of numbering resources). Congress also authorized the Commission to forbear in the public interest from applying any regulation that is not necessary to ensure that services are offered on just, reasonable, and nondiscriminatory terms and conditions or to protect consumers.^{33/} In fact, Congress reinforced this authority elsewhere in the 1996 Act: consistent with the Act’s overall purpose to “reduce regulation in order to . . . encourage the rapid deployment of new telecommunications technologies,”^{34/} Congress directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” using “regulatory forbearance” and “other regulating methods that remove barriers to infrastructure investment.”^{35/} And finally, Congress preserved the

^{31/} *Id.* § 230(b)(2) (emphasis added).

^{32/} *See id.* § 231(e)(3) (“The term ‘Internet’ means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.”); *id.* § 230(f)(1) (defining the Internet as “the international computer network of both Federal and non-Federal interoperable packet switched data networks”); *id.* § 230(f)(2) (defining interactive computer service to include “any information service, system, or access software provider . . . including specifically a service or system that provides access to the Internet . . .”).

^{33/} *See id.* § 160(a).

^{34/} Preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

^{35/} 47 U.S.C. § 157(a) notes.

Commission's longstanding "elastic powers" under Title I of the Communications Act to manage "dynamic new developments in the field of communications,"^{36/} of which IP-enabled services are a prime example.

The Commission's and Congress's foresight in securing an unregulated space for the Internet and information services generally has permitted IP-enabled services to emerge in a robust fashion as the communications mode of the future, and the Commission should not depart from this approach. While it is true, as the Commission observes, that "the changes wrought by the rise of IP-enabled communications promise to be revolutionary,"^{37/} there is no need for revolutionary change in the unregulatory framework applicable to these services. The Commission already has noted the importance of maintaining a policy of regulatory restraint in this area, and Congress has given it the necessary statutory tools to ensure that the transition from traditional communications services to IP-enabled services will not endanger important public policy concerns. The Commission should use those tools wisely to reaffirm a comprehensive, unregulatory regime for IP-enabled services.

DISCUSSION

The Commission seeks comment on a wide variety of topics relevant to the overall regulatory treatment of IP-enabled services. In the discussion that follows, SBC proposes a comprehensive framework for considering those issues. In Section I, SBC proposes a refined definition for the class of "IP-enabled services" and associated facilities that should be subject to a regime of continued unregulation. In Section II, SBC discusses the Commission's sweeping jurisdiction to maintain that regime. In Section III, SBC explains why IP-enabled services

^{36/} *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (quoting *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846, 853 (5th Cir. 1971)).

^{37/} *NPRM* ¶ 5.

should be classified as Title I information services and why the Commission should cover all bases by forbearing from any otherwise applicable Title II common carrier regulation. In Section IV, SBC describes the sources of the Commission’s authority to craft the narrowly tailored regulatory obligations that may be necessary to meet any *non*-common carrier policy objectives implicated by IP-enabled services, and in Section V, SBC explains how IP-enabled services should be categorized so that any such regulatory obligations can be applied only to those services that raise relevant policy concerns. Finally, in Section VI, SBC identifies the discrete policy concerns that require the Commission’s attention, and describes the proper regulatory solution for each. The most urgent among these, SBC explains, are intercarrier compensation and access to numbering resources, and the Commission should resolve them in the near term. Next, as SBC shows, the Commission should consider issues concerning 911, disability access, universal service, and consumer protection.

I. THE COMMISSION SHOULD DEFINE IP-ENABLED SERVICES AS THOSE THAT ENABLE END USERS TO SEND OR RECEIVE COMMUNICATIONS IN IP FORMAT OVER AN IP PLATFORM.

The Commission identifies its subject in this proceeding as “IP-enabled services,” which it tentatively defines as “services and applications relying on the Internet Protocol family.”^{38/} Recognizing the “broad scope” of this standard, the Commission then seeks comment on how it might “more rigorously distinguish those specific classes of IP-enabled services, if any, on which we should focus our attention.”^{39/}

As explained in SBC’s pending petition for a declaratory ruling, the Commission should adhere to three key principles in defining the family of services falling within its IP-related

^{38/} *Id.* ¶ 1 n.1.

^{39/} *Id.*

unregulatory regime.^{40/} First, it should adopt a broad and inclusive definition that encompasses the full range of services — be they voice, data, video, or any other form — that ride the IP platform, thereby providing a meaningful opportunity for innovation and growth in this market. Second, in order to ensure regulatory certainty, the Commission should articulate bright-line boundaries in stating its definition of IP-enabled services so that this definition can be easily understood by providers and consumers of such services while avoiding reliance on fine technical distinctions that could become obsolete as technologies evolve. Finally, the Commission should adopt an approach that is competitively neutral among all providers (telephone companies, cable companies, wireless companies, satellite companies, and others), so that no provider will experience any special regulatory advantages or disadvantages by virtue of the historic regulatory classification of the non-IP-enabled legacy services it offers. Stated another way, providers of IP-enabled services should not be forced to carry their legacy regulatory baggage into the new competitive market for IP-enabled services.

Consistent with these principles, the Commission should refine its definition of the class of unregulated “IP-enabled services” to consist of (a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and applications provided over an IP platform that enable an end user to send or receive a communication in IP format.^{41/} Under this definition, the touchstone for identifying an IP-enabled service (and distinguishing the service from a traditional legacy service) is that it reaches or leaves the end

^{40/} See generally SBC Declaratory Ruling Petition at 25-28.

^{41/} SBC’s petitions refer to such services as “IP platform services.” While SBC believes that this term better describes the scope of services and facilities that should fall within the Commission’s deregulatory umbrella, SBC uses the Commission’s term, “IP-enabled services,” throughout these comments to avoid confusion.

user in IP format.^{42/} This focus on the functionality afforded the end user is consistent with the Commission’s repeated recognition that the regulatory treatment of a particular service turns on the nature of the service as delivered to the end user.^{43/} It is only where a service is either sent to or received by an end user in IP format — and not when an end user merely receives a communication in circuit-switched format — that the end user can tap into the enormous functional capabilities of the IP platform. The Commission’s definition should account for this defining feature of IP-enabled services.

Importantly, under the definition proposed above, an offering would not lose its status as an IP-enabled service simply because it interfaces at some point with the PSTN. Indeed, as long as the subscriber can send and receive communications in IP format, *that subscriber* is receiving an IP-enabled service. While, as SBC discusses below, such interconnection with the PSTN may implicate particular policy concerns, the overall regulatory classification of the service at issue should not hinge on those concerns because the Commission retains the authority to craft specific regulations as necessary to address them.

SBC’s proposed definition is expansive in that it encompasses IP networks themselves and the services and applications provided over them. Addressing IP-based networks is crucial to creating a rational, unregulatory framework. The quality and range of IP-based services are

^{42/} To be clear, by “reaching or leaving the end user in IP format,” SBC means the end user’s premises. Thus, for example, if an end user originates an IP communication on CPE on its premises, and converts that communication to circuit-switched format before it crosses the demarcation to a service provider’s network, the communication would not qualify as an IP-enabled service. In other words, the communication between the end user and the service provider must be in IP format.

^{43/} See, e.g., *Report to Congress* at 11530 ¶ 59 (“[I]f the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.”); see also 47 U.S.C. § 153(20) (defining an information service based on what “capability” is “offer[ed]”).

directly linked to the capabilities of their underlying platforms, such that regulation of the platforms would necessarily affect the myriad products, services, and applications provided over them.^{44/} Furthermore, the future development of IP-based communications depends on innovation at *both* the service and facility levels. In addition, the definition proposed above is sufficiently broad to cover both networks and services, including all types of communications — voice, data, video, or anything else — so long as they are sent to or received by an end user in IP format over an IP platform. This inclusiveness reflects the fact that, as noted above, IP platforms are capable of supporting all forms of communications by reducing them to packets that can be commingled and transported over a range of facilities.

The definition described above also benefits from having bright-line boundaries to ensure predictability and certainty. The central aspect of this approach is an emphasis on the ability to send or receive communications in IP format over an IP platform, a distinction that is apparent to, and thus understood by, both providers and consumers of these services. Providers will instantly know what uses of IP will or will not entitle them to the unregulatory umbrella applicable to IP-enabled services, while consumers will likewise know, by virtue of the functionality they receive, how a service will be categorized.

Finally, this approach is competitively neutral, in that it applies to IP-to-the-end-user offerings provided by *any* type of communications provider — including telephone companies, cable companies, wireless providers, satellite companies, and any other type of entity regardless of whether it is a “carrier” with respect to its legacy non-IP services. Similarly, it applies to any type of facility — such as copper, coaxial cable, fiber, spectrum, powerline and any other medium used as part of the IP platform. This is important given the openness and modularity of

^{44/} See SBC Declaratory Ruling Petition at 29.

the IP platform, which, as noted above, presents end users with varied choices between (i) obtaining particular components (*e.g.*, software, customer premises equipment (“CPE”), broadband services) from individual providers and managing their own networks, or (ii) purchasing wholly or partially assembled IP platform services from one or more service providers. Consistent regulatory treatment of all such components and providers will ensure that the choices between these options are driven by marketplace forces, not artificial regulatory distinctions.

The definition of “IP-enabled services” used in the *NPRM* — “services and applications relying on the Internet Protocol family” — is broader than that described above, and as a result, is somewhat overinclusive. As the Commission recently recognized, it is important not to confuse genuine IP platform services with services, such as AT&T’s PSTN-IP-PSTN voice service, that rely on IP technology only “in the middle” without offering customers the enhanced functionality associated with IP platforms. In the Commission’s own words, this is not “the kind of use of the ‘Internet or interactive services’ that Congress sought to single out for exceptional treatment.”^{45/} At the same time, the Commission’s definition fails to include IP-specific *facilities*, such as routers, over which IP-enabled services are provided and to which they are inextricably linked.^{46/} This underinclusiveness could render any regulatory solutions the Commission adopts in this proceeding incomplete.

In short, the Commission should rule that any service that reaches or leaves a customer in IP format over an IP platform will fall under the unregulatory umbrella the Commission

^{45/} Order, *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97 ¶ 17 (rel. Apr. 21, 2004) (“AT&T Access Charge Order”).

^{46/} See SBC Declaratory Ruling Petition at 29.

establishes in this proceeding, as should the underlying IP-specific facilities.^{47/} This definition is sufficiently versatile to accommodate future services that cannot yet be anticipated. As such, it is a more preferable approach to defining these services than that reflected in the categories recognized by the Commission in the 1998 *Report to Congress* — specifically, phone-to-phone, computer-to-phone, and computer-to-computer, which the Commission tentatively used to categorize different VoIP services.^{48/} These categories are considerably outdated, because the evolution of the CPE used with IP-enabled services increasingly blurs any meaningful distinction between “telephones,” “computers,” and various other devices (such as the IP adapters offered by some VoIP providers) that can be used to provide such services. Moreover, by their reliance on “phones,” the categories described in the *Report to Congress* are inherently voice-centric and largely ignore video, data, and other IP-enabled services. Rather than building regulatory distinctions on the tenuous differences in the CPE used for voice communications, the Commission should employ a more holistic approach that focuses on the functional attributes of IP-services, as SBC proposes above.

II. IP-ENABLED SERVICES ARE INHERENTLY AND INDIVISIBLY INTERSTATE COMMUNICATIONS SUBJECT TO THE COMMISSION’S JURISDICTION.

The Commission seeks guidance on “the appropriate basis or bases for asserting federal jurisdiction over the various categories of IP-enabled services”^{49/} and the extent to which “IP-enabled service[s] should be deemed subject to *exclusive* federal jurisdiction with regard to

^{47/} See *supra* note 42.

^{48/} See *NPRM* ¶ 44 (asking comment on whether the Commission should revisit any regulatory interpretations, including those set forth in the *Report to Congress*).

^{49/} *Id.* ¶ 40.

traditional common carrier regulation.”^{50/} The answer to this question is straightforward. The Commission has clear jurisdiction over all “interstate communications,” and such communications undoubtedly include IP-enabled services. The inherently interstate nature of these services derives from the nationally and internationally dispersed networks over which they are provided. These services are also *indivisibly* interstate because their portable nature and the inherent geographic indeterminacy of IP transmissions make it infeasible to segregate any intrastate component of these services for regulatory purposes. As such, IP-enabled services fall categorically within the Commission’s exclusive jurisdiction.

A. IP-Enabled Services Are Overwhelmingly Interstate in Nature.

The Communications Act gives the Commission broad jurisdiction over “all interstate and foreign communication by wire or radio.”^{51/} The Act defines “communication by wire” as “the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission,”^{52/} and “communication by radio” as “the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission.”^{53/} IP-enabled services, as explained above, are communications by wire or radio, and the IP platform over which IP-enabled services are transmitted is clearly an instrumentality, facility, or apparatus required for such transmission.

^{50/} *Id.* ¶ 41.

^{51/} 47 U.S.C. § 152(a).

^{52/} *Id.* § 153(52).

^{53/} *Id.* § 153(33).

IP-enabled services are also inherently interstate. This is true for the same reasons the Commission has always deemed Internet-based services to be interstate in nature.^{54/} Internet-based services necessarily involve interstate communications because of the dispersed nature of the Internet itself.^{55/} Internet communications “interact[] with a global network of interconnected computers,”^{56/} and thus “involve computers in multiple locations, often across state and national boundaries.”^{57/} The Commission relied on precisely these aspects of Internet-based services when it asserted jurisdiction in 1998 over DSL services,^{58/} and in 1999 and 2001 over dial-up services offered by ISPs,^{59/} both of which necessarily involve a fundamental interstate component.

Likewise, IP-enabled services rely on the same dispersed networks that constitute the Internet, and the key enabling equipment that provides the stored information and the processing capabilities with which subscribers interact (such as web and feature servers) will in most cases

^{54/} See, e.g., Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9176 ¶ 54 (2001) (“*ISP Remand Order*”) (noting that the Commission “ha[s] always held [ISP-bound traffic] to be predominantly interstate for jurisdictional purposes), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 123 S. Ct. 1927 (2003); *id.* at 9177-78 ¶ 55 (“[T]he Commission has been consistent in its jurisdictional treatment of ISP-bound traffic.”).

^{55/} See, e.g., *id.* at 9178 ¶ 58; Memorandum Opinion and Order, *GTE Telephone Operating Cos.*, 13 FCC Rcd 22466, 22468 ¶ 5 (1998) (“*GTE Order*”) (describing the Internet as “an international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world”); Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4799 ¶ 1 n.1 (2002) (“*Cable Modem Order*”) (defining “the Internet” as a “global information system”), *rev’d on other grounds sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003) (“*Brand X*”).

^{56/} *ISP Remand Order* at 9178 ¶ 58.

^{57/} *Id.* at 9178 ¶ 58 n.115.

^{58/} *GTE Order* at 22483 ¶ 33.

^{59/} See, e.g., *ISP Remand Order* at 9176 ¶ 54.

be located outside the state in which a particular user is located. For example, the transmission, storage, and processing associated with an IP-enabled service is likely to involve servers, gateways, and other equipment located within and outside of the state in which the user of the IP-enabled service is located. And some IP-enabled services, such as SBC's Hosted IP Communications Service ("HIPCS"), allow an end user to make a VoIP call while simultaneously pursuing other tasks that likewise entail interstate communications, such as accessing the Internet and obtaining calendars, contact lists, and other information stored on a distant database.^{60/} Moreover, with an IP-enabled service, like other Internet-based services, a "user may, for example, access websites that reside on servers in various state[s] or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country, and may do so either sequentially or simultaneously."^{61/} Thus, when end users use an IP-enabled service to communicate with each other, the interstate nature of the service is engaged no matter where the end users are physically located.^{62/}

^{60/} See http://www02.sbc.com/Products_Services/Business/ProdInfo_1/1,,1358--1-1-0,00.html (last visited May 26, 2004).

^{61/} *GTE Order* at 22478-79 ¶ 22 (footnote omitted). For example, "[O]n a sports page, only the format of the webpage may be stored at the host computer in Chicago. The advertisement may come from a computer in California (and it may be a different advertisement each time the page is requested), the sports scores may come from a computer in New York City, and a part of the webpage that measures Internet traffic and records the user's visit may involve a computer in Virginia. If the user decides to buy something from this webpage, say a sports jersey, the user clicks on the purchase page and may be transferred to a secure web server in Maryland for the transaction." *ISP Remand Order* at 9178 ¶ 58.

^{62/} Cf. *GTE Order* at 22479 ¶ 23 ("mixed-use" special access lines (*i.e.*, lines carrying both intrastate and interstate traffic) are subject to the Commission's jurisdiction where it is not possible to separate the uses of the special access lines by jurisdiction") (citing Decision and Order, *MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660, 5660-61 ¶ 7 (1989)).

That IP-enabled services are interstate communications is further underscored by their inherent portability: end users may use them wherever they have access to a broadband connection. For example, with SBC's HIPCS product, end users will be able to take their laptops to any location while "virtually" remaining in their home office. And VoIP permits telephone calls to be placed with the same geographical indifference: depending on the particular service, a user can plug his phone into any broadband connection anywhere in the country, and the call will appear to be placed from the user's chosen area code. Indeed, in the *Pulver Declaratory Ruling*, the Commission found that the FWD service is an interstate service based in part on the fact that a user's "physical location can continually change."^{63/} Thus, even where an IP-enabled service may have an "intrastate" component, the service itself is properly deemed interstate because the overwhelming majority of communications will be interstate, thus placing the service within the Commission's jurisdiction.

B. IP-Enabled Services Are Indivisibly Interstate Because It Is Infeasible to Segregate Any Intrastate Component.

IP-enabled services are also *indivisibly* interstate because, even when they can be said to have interstate and intrastate components, differentiating between both those components is completely impractical if not impossible.^{64/} The Commission,^{65/} courts,^{66/} and carriers^{67/} have

^{63/} *Pulver Declaratory Ruling* at 3320 ¶ 20.

^{64/} Although the Commission described this principle in the *Pulver Declaratory Ruling* as the "mixed use" doctrine, *see id.* at 3321-22 ¶ 22, the Commission has generally referred to it as the "inseverability doctrine" when applied to services and "mixed use" only when applied to facilities. *Compare, e.g., GTE Order* at 22481 ¶ 28 ("Under the inseverability doctrine, pre-emption of state regulation is permissible 'where it is not possible to separate the interstate and the intrastate components of the asserted FCC regulation.'") (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986)), with *GTE Order* at 22479 ¶ 23 (explaining that the "mixed-use facilities rule" originated with respect to special access lines for which interstate and intrastate usage could not be separated). Whichever term is used, the principle remains the

long recognized that, when the interstate and intrastate components of a service are inseverable, the Commission has jurisdiction over the complete service, including any intrastate component.^{68/}

A single IP-enabled service often involves simultaneous interaction with a dispersed network of end users, websites, and databases located in various states or countries. This obscures any distinction between the interstate and intrastate components of an IP-enabled service. Additionally, the nature of IP technology itself renders any attempt to isolate an intrastate component of such services impractical. As described above, IP technology translates

same: exclusive Commission jurisdiction prevails when it is impossible or impractical to separate the interstate and intrastate components of the traffic or facility at issue.

^{65/} See, e.g., First Report and Order and Further Notice of Proposed Rulemaking, *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 23031-32 ¶ 107 (2000) (“Because fixed wireless antennas are used in interstate and foreign communications and their use in such communications is inseverable from their intrastate use, regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission’s authority.”) (footnote omitted).

^{66/} See, e.g., *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 375 n.4 (addressing the Commission’s jurisdiction “where it was not possible to separate the interstate and intrastate components of the asserted FCC regulation”); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (observing that “the services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements”); *Illinois Bell Tel. Co. v. FCC*, 833 F.2d 104 (D.C. Cir. 1989); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Public Util. Comm’n of Tex. v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989); *North Carolina Utils. Comm’n v. FCC*, 552 F.2d 1036 (4th Cir. 1977); *North Carolina Utils. Comm’n v. FCC*, 537 F.2d 787 (4th Cir. 1976).

^{67/} AT&T Corp. Petition for Declaratory Ruling, *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, at 13 (filed May 15, 2003) (“AT&T Calling Card Petition”) (“The Commission has never attempted separately to identify and regulate each of the constituent ‘calls,’ or ‘communications,’ in th[e] context of Internet traffic]. Rather, the Commission has simply deemed the entire session jurisdictionally interstate.”) (citations omitted).

^{68/} To the extent a state may be deemed to have concurrent jurisdiction with the Commission over the intrastate component of such a service, the Commission should preempt any regulation that is inconsistent with federal policy, as discussed further *infra* section III.C.

all forms of communications into packets, permitting these packets to be flexibly and efficiently routed to their destinations. As convergence continues, a data stream may at any given time include packets (consisting of voice, data, video, or some combination thereof) bound for points both within and outside of a particular state. However, there is no commercially feasible way for carriers to track, on a bit-by-bit basis, the exact routes of those packets. This is because the routing of IP-based communications is based on matching a numeric IP address to a particular device — such as an end user’s computer or IP phone, a router, or a server, to name a few — rather than an immovable geographic destination. The resulting portability of IP-enabled services and devices — *i.e.*, the ability to access these services by plugging an IP device into any broadband connection — itself thwarts any effort to isolate an intrastate “component” of such services.

Given these inherent qualities of the Internet and IP technology, it is well-established that “the interstate and intrastate components [of such services] cannot be reliably separated”^{69/} and that they are thus categorically subject to the Commission’s jurisdiction.^{70/} The Commission reached the same conclusion with respect to FWD in the *Pulver Declaratory Ruling*, concluding that it had jurisdiction over that service because “it would be impractical to determine whether

^{69/} *ISP Remand Order* at 9175 ¶ 52 (citing *Southwestern Bell Tel. Co.*, 153 F.3d at 543).

^{70/} *Id.* (citations omitted). Although the D.C. Circuit has twice urged the Commission to consider more carefully whether, as a substantive matter, dial-up ISP-bound traffic is subject to the “reciprocal compensation” provision of section 251(b)(5), it has expressly affirmed the Commission’s long-standing *preemptive jurisdiction* over ISP services. *See Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000) (“[t]here is no dispute that the Commission has historically been justified” in treating dial-up Internet access as interstate); *see also WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

there was any intrastate component to FWD given the fact that FWD’s information service as provided to its members occurs solely within the confines of the Internet.”^{71/}

The difficulties in separating the interstate and intrastate components of IP-enabled services exist regardless of whether one end of that service touches the PSTN. While it may be easy enough to locate the PSTN end of such a communication, it is still commercially infeasible to identify the physical location at the IP end. Indeed, while a POTS subscriber may be located at a known geographic address, a VoIP subscriber, using the same VoIP device, can call that POTS subscriber from across the street, across the state, across the country, or across the world — without any practicable way to identify that VoIP subscriber’s location.^{72/} Thus, for the same basic reason that it would be infeasible to carve out an “intrastate” component of IP-enabled services that (like Pulver’s VoIP offering) always have *both* feet in an IP network, it would also be difficult to carve out an “intrastate” component of IP-enabled services that, like SBC’s HIPCS product or Vonage’s VoIP service, can interconnect with the PSTN and thus permit communications with *one* foot in an IP network.

Furthermore, forcing providers to develop a capability to identify those communications that are actually intrastate in an IP-enabled service would unnecessarily burden the future development of such services. As the Commission explained in its *Pulver Declaratory Ruling*, given the inherent geographic anonymity of the IP addressing schemes, “[a]ttempting to require [the provider] to locate its members for the purpose of adhering to a regulatory analysis that served [the legacy PSTN] would be forcing changes on this service for the sake of regulation

^{71/} *Pulver Declaratory Ruling* at 3320 ¶ 20.

^{72/} See, e.g., *Petition for Declaratory Ruling, Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. WC 03-211, at 28-29 (filed Sept. 22, 2003).

itself, rather than for any particular policy purpose. . . . [I]mposing this substantial burden would make little sense and would almost certainly be significant and negative for the development of new and innovative IP services and applications.”^{73/} In sum, IP-enabled services are properly deemed indivisibly interstate communications within the Commission’s jurisdiction.

III. IP-ENABLED SERVICES ARE TITLE I INFORMATION SERVICES AND DO NOT FALL WITHIN TITLE II.

The Commission seeks comment on “the proper legal classification and appropriate regulatory treatment” of each discrete category of IP-enabled services.”^{74/} As a first step toward ensuring an unregulated environment for IP-enabled services, the Commission should conclude that such services, as defined by SBC, are “information services,” and therefore subject to regulation under Title I, but outside the scope of Title II common carrier regulations and the other substantive Titles of the Act. In those limited instances in which a service does not appear to fall squarely within the information services category, the Commission should forbear from applying legacy Title II common carrier regulation or any other substantive Titles of the Act to that service. The Commission should likewise find that any state-level counterparts to such regulation will almost invariably frustrate important federal policy and will thus be preempted.

A. IP-Enabled Services Should Be Deemed Title I Information Services.

In light of their various capabilities described above, IP-enabled services that satisfy SBC’s proposed definition — that is, services that enable customers to send or receive communications in IP format^{75/} — are best characterized as “information services.” IP-enabled services utilize the Internet to provide an information and communications management tool — a

^{73/} *Pulver Declaratory Ruling* at 3320-21 ¶ 21, 3323 ¶ 24.

^{74/} *NPRM* ¶ 42.

^{75/} *See supra* note 42.

means of fusing computing power and communications. Use of an IP platform to provide a service that originates or terminates in IP, unlike use of the PSTN to originate and terminate telephone calls, directly offers “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,”^{76/} even if it also offers services resembling those regulated under other substantive Titles of the Act. IP-enabled services may allow end users to connect to the Internet (a functionality that the Commission has long deemed an information service), gain access to stored files (such as voicemail or directory information), protect their privacy through customized call screening, and route communications in a manner customized to the end user’s preferences. Many IP-enabled services also include a net protocol conversion that allows customers to interface with the PSTN — traditionally a hallmark of information services under the Commission’s precedent.^{77/} As the

^{76/} 47 U.S.C. § 153(20).

^{77/} See, e.g., *AT&T Access Charge Order* ¶ 4 & n.13 (“[G]enerally, services that result in a protocol conversion are enhanced services”); First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21956 ¶ 104 (1996) (“*Non-Accounting Safeguards Order*”) (explaining that a protocol conversion “that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly ‘transforms’ user information,” while “services that interpret and react to protocol information associated with the transmission of end-user content clearly ‘process’ such information”). As the Commission observed in the *AT&T Access Charge Order*, the service at issue there involved no *net* protocol conversion. See *AT&T Access Charge Order* ¶ 13. The occurrence of a net protocol conversion should not be considered an *essential* criterion for classification as an “information service,” even though it often is a *sufficient* condition. *NPRM* ¶ 44 (noting that the Commission’s definition of “enhanced services” includes services that “‘employ computer processing applications that act on the . . . protocol . . . of the subscriber’s transmitted information’” and seeking comment on whether the Commission should “continue to accord this specific distinction dispositive weight when classifying services”) (quoting 47 C.F.R. § 64.702(a)). Some IP-enabled services, such as Pulver’s FWD service, may not involve any sort of protocol conversion because the communications they support are both sent and received in IP format. Yet these services are still considered information services. See *Pulver Declaratory Ruling* at 3313-14 ¶ 11.

Commission recently found, a service that offers such “computing capabilities” must be considered an information service.^{78/}

As IP-enabled services develop, it will become even more obvious that they are properly characterized as information services rather than telecommunications services. The IP-enabled services being introduced today allow customers to design and individualize many aspects of their communications directly from their desktop — a dramatic change from centrally controlled telecommunications networks. And these services are evolving toward even greater integration of voice, data, and video applications, allowing manipulation of data in ways that blend traditional categories and melt away old regulatory distinctions. The Commission should account for this inevitable evolution of IP-enabled services by declaring that they are inherently information services.

The alternative is to adopt a regressive “telecommunications service” classification for such services that would become obsolete upon its release. But the Commission should reject simplistic “quacks like a duck” arguments that claim VoIP services should be regulated because they bear some similarity to traditional telephone services. In reality, voice is just one of the countless applications that will be offered as part of IP-enabled services. VoIP is no more a traditional telephone service than email is a traditional mail service — it is a revolutionary and disruptive advancement that provides consumers with much greater capabilities. Investment and innovation in IP-enabled services would be stopped in its tracks if regulators were to dissect IP-enabled services and force them into outdated regulatory silos or even if they were to spend years debating the issue. The Commission is in a unique position to preserve an environment of regulatory restraint that has allowed IP-enabled services to develop in the first instance.

^{78/} *Pulver Declaratory Ruling* at 3313-14 ¶ 11.

Classifying IP-enabled services as information services would not preclude the Commission from exercising its Title II non-carrier-specific authority or its broad Title I authority to address specific public policy concerns, as discussed below. Nor would it have any effect on existing rights of access to legacy, non-IP-based services and certain of the facilities that support them. First, no matter what services an ILEC might provide over given facilities in its network, a CLEC would still be entitled to lease network elements to the extent the Commission has found such unbundling to be consistent with section 251(d)(2). For example, to the extent that the Commission retains unbundling obligations for the copper loop, those obligations would continue notwithstanding a determination that the ILEC's IP-enabled services offered over that loop fall outside the scope of Title II common carrier regulation. Furthermore, to the extent the Commission deems necessary, ILECs would remain subject to existing *Computer II* obligations for non-IP-enabled information services, thus ensuring unbundled access to legacy transmission services.

B. IP-Enabled Services Are Not Telecommunications Services Falling Within Title II of the Act.

The same dynamic capabilities that cause IP-enabled services to be classified as information services correspondingly *prevent* them from falling neatly within any of the Act's substantive Titles. The structure of the current Communications Act was established at a time when, for the most part, particular *services* were tightly linked to particular *facilities* and those facilities were owned by monopoly or near-monopoly providers. Those providers are subject to disparate regulatory regimes codified in the Act's service-specific Titles (telephone companies are subject to Title II, broadcasters to Title III, and cable companies to Title VI). IP technology obliterates those old regulatory assumptions.

IP technology supports a variety of end-user applications and services, whose functionalities mimic those of traditional communications services (such as voice and data) that carriers have long provided to end users over legacy networks specially designed for those services. The IP platform converts voice and data into packets and transmits them as part of a larger bitstream containing a variety of other applications. As a result, end users can use the Internet platform and its multiplicity of underlying networks for services and applications that look like (but in fact are not) “telecommunications services” regulated under Title II (for example, VoIP services that originate and/or terminate in IP format); “broadcast services” regulated under Title III (for example, streaming audio); and “cable services” regulated under Title VI (for example, switched IP video services). Because IP-enabled services encompass all of these functions, they transcend the traditional statutory categories and cannot be appropriately regulated under any of these substantive Titles.

The inherent capability of IP-enabled services to meld a multitude of integrated services traditionally offered by siloed industry segments is consistent with and reinforces the existing distinction between “information services” and “telecommunications services” as the Commission has historically interpreted those terms. The Commission should not fundamentally reinterpret those two terms, even if such reinterpretation could be consistent with the constraints of their statutory definitions.^{79/} The dichotomy between unregulated information (or “enhanced”) services and regulated telecommunications (or “basic”) services, while not always perfectly clear, has been a cornerstone of telecommunications policy since *Computer II*. Many

^{79/} See *NPRM* ¶ 44 (seeking comment on whether the Commission’s previous interpretations of the statutory classifications “are or are not suitable for proper classification of IP-enabled services”); see also *id.* ¶ 45 (stating that “the disparate regulatory treatment assigned to providers of ‘telecommunications services’ and ‘information services’ might well be inappropriate in the context of IP-enabled services”).

providers have structured their business plans specifically around the present understanding of the differences between those regulatory categories. Introducing radically new interpretations or applications of those terms now could dramatically alter the way in which existing products and services are designed, marketed, and regulated, potentially causing confusion for both consumers and providers while forcing providers to alter their business operations in light of the possible shift in regulatory obligations.

C. The Commission Should Forbear from Applying Title II Common Carrier Regulation to IP-Enabled Services To the Extent Such Services Do Not Fall Squarely Within the Category of Information Services.

To guard against the possibility that a given IP-enabled service, in its current form, may not appear to fall squarely into the information services category, the Commission should eliminate any doubt concerning the unregulated status of IP-enabled services by using its authority under section 10 of the Act to forbear from applying Title II common carrier regulation to these services (as well as Title III and Title VI regulation) to the extent such regulation might otherwise be found to apply. The Commission notes in the *NPRM* that “[u]se of this forbearance authority might be appropriate if the statutory classification accorded to a particular class of IP-enabled services leads to regulatory consequences that are neither necessary nor appropriate in the context of such services.”^{80/} In fact, subjecting any IP-enabled service to Title II common carrier regulation, even if it is found to fall within the statutory definition of a “telecommunications service,” would be both unnecessary and inimical to the development of such services generally.

For the reasons stated by SBC in its pending petition for forbearance regarding IP platform services, the Commission should thus forbear from Title II common carrier regulation at

^{80/} *Id.* ¶ 47.

the same time that it finds that all IP-enabled services are unregulated information services under Title I.^{81/} The Commission’s previous ruling on cable modem service provides a valuable lesson in this regard. There, after concluding that cable modem service is an “information service” outside the scope of Title II common carrier regulation, the Commission proceeded on its own motion to waive the application of *Computer II* requirements but only tentatively concluded that forbearance from applying *any* Title II common carrier regulation was appropriate.^{82/} After the Commission released its *Cable Modem Order*, the Ninth Circuit reversed its ruling on the classification issue (though it expressly preserved the Commission’s power to forbear from Title II regulation despite finding that cable modem service contains a “telecommunications service” component).^{83/} But because the Commission had only *tentatively* concluded that forbearance was appropriate, the unregulated status of cable modem service remains in doubt.

^{81/} See generally SBC Forbearance Petition at 2-12. Although portions of that petition refer to forbearance from Title II regulation generally, that language was intended as shorthand for common carrier regulation under Title II, as other portions of the petition make clear. See, e.g., *id.* at 4 (stating that the forbearance criteria under section 10 of the Communications Act apply “to require forbearance from Title II common carrier regulation of IP platform services”). SBC’s request for forbearance is thus limited to common carrier regulation under Title II, and does not encompass requirements falling within the Commission’s Title II non-carrier-specific authority, as defined *supra*.

^{82/} See *Cable Modem Order* at 4825-26 ¶ 45, 4847 ¶ 94. As the Commission explained:

Given that cable modem service will be treated as an information service in most of the country, we tentatively conclude that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service. We also believe that forbearance would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing.

Id. at 4847-48 ¶ 95.

^{83/} *Brand X*, 345 F.3d at 1132 n.14.

The Commission need not be tentative in the use of its forbearance authority here; it should forbear from the application of Title II common carrier regulation to IP-enabled services. The Commission must ensure competitive neutrality in this area by adopting congruent rules for intermodal providers of competing services.^{84/} For that reason alone, if the Commission responds to the *Brand X* decision by forbearing from the application of Title II obligations to cable modem service, it will be legally obligated to forbear to the same extent from the application of such regulations to any IP-enabled service that might be characterized as a telecommunications service under the Ninth Circuit’s reasoning.^{85/}

Indeed, the Act requires forbearance here even apart from the need to ensure consistency with the Commission’s cable modem policies in the wake of the *Brand X* decision. Section 10 provides that the Commission “shall forbear” from applying regulations that are (1) “not necessary to ensure that . . . charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory” and (2) “not necessary for the protection of consumers,” and where (3) forbearance would be in “the public interest.”^{86/} In assessing the third of these criteria, the Act specifically requires the Commission to consider whether forbearance “will promote competitive market conditions.”^{87/} As discussed in more detail in SBC’s forbearance petition, each of these criteria is met here.

^{84/} See generally *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 578-90 (D.C. Cir. 2004) (“*USTA II*”).

^{85/} See *Brand X*, 345 F.3d at 1129 (“[U]nlike other ISPs, [a cable modem provider] controls all of the transmission facilities between its subscribers and the Internet. . . . [T]o the extent that [a cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecom service.”) (quoting *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-78 (9th Cir. 2000)).

^{86/} 47 U.S.C. § 160(a).

^{87/} *Id.* § 160(b).

First, Title II common carrier regulation is not necessary to ensure that IP platform services will be offered in a just, reasonable, and nondiscriminatory manner.^{88/} As noted above, the market for IP-enabled services is already highly competitive and operates pursuant to cooperative business arrangements. Thus, market forces will continue to ensure that rates will be kept at reasonable levels and that providers' practices — with respect to consumers and to each other — will remain reasonable and nondiscriminatory.

Second, Title II common carrier regulation is not necessary to protect consumers.^{89/} Consumers already have benefited greatly from the hands-off approach that has made the Internet's exponential growth possible.^{90/} In fact, not only would regulation fail to afford consumers any additional protections, but it would in fact harm them by providing disincentives to continued innovation and thus limit the range of IP-enabled services that are available. And, as discussed below, forbearance will neither disturb the enforcement of generally applicable consumer protections nor preclude the development of additional requirements specifically tailored to address certain public policy objectives. In particular, the Commission has authority

^{88/} *Id.* § 160(a)(1); *see also* SBC Forbearance Petition at 11.

^{89/} 47 U.S.C. § 160(a)(2); *see also* SBC Forbearance Petition at 10-11.

^{90/} The Commission has recognized that competition is more effective than regulation for protecting consumers:

Competitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production. Accordingly, where competition develops, it should be relied upon as much as possible to protect consumers and the public interest.

1997 Access Charge Reform Order at 16094-95 ¶ 263.

to implement essential policy goals related to consumer protection without any need to classify IP-enabled services as telecommunications services.^{91/}

Finally, forbearance is needed to serve the public interest.^{92/} Title II common carrier regulation would selectively impose costs on certain providers of IP-enabled services, discouraging new entrants from offering such services while driving existing providers to tailor services based on regulatory requirements rather than consumer needs. This result would be contrary to the Commission's undeniable public interest obligation under section 706 of the 1996 Act to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" through "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment."^{93/} In order to promote these goals, the Commission should reinforce its conclusion that IP-enabled services are information services by granting SBC's petition for forbearance. Doing so will not disrupt the Commission's authority to address the various public policy objectives discussed below.

^{91/} See *infra* section VI.F (discussing the application of consumer protection laws to IP-enabled services).

^{92/} 47 U.S.C. § 160(a)(3); see also SBC Forbearance Petition at 5-10.

^{93/} 47 U.S.C. § 157(a) note; see also *id.* § 230(b)(2). Although the Commission has not viewed section 706 as an *independent* source of forbearance authority, it has emphasized that the mandate of section 706 to promote broadband investment through "regulatory forbearance" weighs heavily in favor of forbearing under section 10 from unnecessary regulation of advanced services. See Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044-45 ¶ 69 (1998) ("[S]ection 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.").

D. The Commission Should Preempt State Regulations of IP-Enabled Services That Negate Clear Federal Policies.

For the same reasons that forbearance from any otherwise applicable Title II common carrier regulation is appropriate for all IP-enabled services, the Commission should affirmatively preempt any state-level counterparts to such regulation as irreconcilable with federal policy in this area, and should likewise make clear that any other state regulations that undermine the congressionally mandated policy of unregulation will be preempted. If (as it should) the Commission determines that IP-enabled services are interstate information services as a categorical matter, a state cannot then rule that any intrastate component of such services should be subject to common carrier or other state regulation. While the Commission must accommodate valid state interests that are *consistent* with federal policy,^{94/} it is specifically empowered to preempt those state regulations that would “negate valid FCC regulatory goals” with respect to the interstate portion of a communication.^{95/}

The Commission should determine that its preemptive power extends both to any state-level regulation that corresponds to Title II “common carrier” regulation — *i.e.*, regulations of the rates, terms, and conditions for providing service — and to any other type of state regulation that will burden the provision of IP-enabled services and interfere with Congress’s vision of an IP-enabled services market unfettered by regulation. For example, a state 911- or E-911-related regulation, which might not strictly be categorized as a regulation of the terms of service, could in some cases conflict with federal policy in this area. Accordingly, the Commission should not

^{94/} See *California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994) (“*California III*”).

^{95/} *Id.* at 931; see also *NARUC v. FCC*, 880 F.2d 442, 429 (D.C. Cir. 1989) (stating that “the *only* limit that the Supreme Court has recognized on a state’s authority over intrastate telephone service occurs when the state’s exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication”); *GTE Order* at 22481 ¶ 28; *Pulver Declaratory Ruling* at 3320 ¶ 20.

limit any description of its preemptive power to state regulation that resembles Title II common carrier regulation, and it should further clarify that such preemption applies across the board to protect *all* providers of IP-enabled services from regulation. This is not to say *every* state regulation of any type would necessarily be subject to preemption. A generally applicable state consumer protection requirement may not conflict with the Commission’s unregulatory approach, and thus would not be presumptively preempted. But the Commission should make clear that its broad unregulatory approach leaves little room for state regulation of IP-enabled services as a general matter, and that most regulations targeted at IP-enabled services, or carried over to such services from the common carrier/public utility regulatory regime, are presumptively preempted.

Preemption is entirely appropriate. As an initial matter, a prerequisite for state regulation is that the service in question is either purely “intrastate” or has severable “interstate” and “intrastate” components that are amenable to separate federal and state regulatory regimes. As discussed above, however, IP-enabled services are primarily interstate and, as a practical matter, do *not* contain a severable intrastate component.^{96/} Indeed, requiring providers of IP-enabled services to develop the capability to isolate such a component solely to facilitate the imposition of state regulation would “negat[e] federal objectives for the interstate component” by imposing costly and unreasonable burdens that would ultimately impede the development of these services.^{97/} As the Commission explained in its *Pulver Declaratory Ruling*, “In a dynamic market such as the market for Internet applications like FWD, we find that imposing this

^{96/} See *California III*, 39 F.3d at 931-33; *GTE Order* at 22481 ¶ 28; *Pulver Declaratory Ruling* at 3320 ¶ 20 (stating that a service is subject to exclusive federal jurisdiction if it is not “practically and economically possible to separate [its] interstate and intrastate components . . . without negating federal objectives for the interstate component”).

^{97/} *Pulver Declaratory Ruling* at 3320 ¶ 20.

substantial burden would make little sense and would almost certainly be significant and negative for the development of new and innovative IP services and applications.”^{98/} The same is true for all IP-enabled services. Indeed, imposing this burden would undermine the Commission’s authority with respect to IP-enabled services. As AT&T explained in another proceeding:

With the proliferation of broadband networks and enhanced services — including the Internet — the prevalence of services that combine enhanced communications and voice call routing will only increase. Attempts to assert intrastate jurisdiction over such services by focusing in isolation on one aspect of the service — the routing of the voice call — threatens to undermine the ability of the Commission to fulfill its statutory responsibility to regulate interstate communications.^{99/}

Furthermore, as a general matter, most state regulation of IP-enabled services is not only *unnecessary* in light of the highly competitive marketplace for IP-enabled services, but would affirmatively discourage innovation and investment by imposing burdensome costs on providers. That would thwart the clear federal policy embodied in the Act of promoting the development and deployment of this class of services without governmental intervention. The Commission affirmed this principle in asserting its authority to preempt state regulation of Pulver’s FWD service, noting that because that service “is an unregulated information service[,] . . . *state* regulations that seek to treat FWD as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with [the federal] policy of nonregulation.”^{100/}

The Commission should confirm its authority and intention to preempt any such state regulation going forward. This is particularly important now, in light of emerging activity at the

^{98/} *Id.* at 3323 ¶ 24.

^{99/} AT&T Calling Card Petition at 13-14.

^{100/} *Pulver Declaratory Ruling* at 3316 ¶ 15 (emphasis added).

state level in this area. It is true, as the Commission has recognized, that “most states have not acted to produce an outright conflict between federal and state law that justifies Commission preemption[.]”^{101/} But at least 18 states have started to take positions on the regulatory classification and treatment of specific VoIP services or are actively contemplating whether to do so. To name just a few recent examples, the New York Public Service Commission just determined that Vonage must be regulated as a “telephone corporation” under state law by virtue of its VoIP offering.^{102/} And the California Public Utilities Commission tentatively found that VoIP is a public utility telecommunications service under state law and initiated an investigation into whether it should be regulated as such.^{103/} These *ad hoc* proceedings threaten future

^{101/} *Id.* at 3318-19 ¶ 18.

^{102/} See Order Establishing Balanced Regulatory Framework for Vonage Holdings Corp., *Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corporation Concerning Provision of Local Exchange and InterExchange Telephone Service in New York State in Violation of the Public Service Law*, Case No. 03-C-1285, at 9, 13 (N.Y. Pub. Serv. Comm’n May 21, 2004) (asserting state jurisdiction to regulate Vonage’s VoIP service and finding that, even if the Commission were ultimately to classify that service as an “information service,” the state could still regulate its intrastate aspects).

^{103/} See Order Instituting Investigation, *Order instituting investigation on the Commission’s own motion to determine the extent to which the public utility telephone service known as Voice over Internet Protocol should be exempted from regulatory requirements*, at 3 (Cal. Pub. Utils. Comm’n Feb. 11, 2004). During the past year, Minnesota and Wisconsin also took steps to subject providers of such services to regulations applicable to traditional telephone companies. See Order Finding Jurisdiction and Requiring Compliance, *Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108 (Minn. Pub. Utils. Comm’n Sept. 11, 2003); *Wisconsin Decides VoIP Getting Too Big to Ignore*, Broadband Business Report (Sept. 23, 2003) (noting that the Wisconsin commission, without a hearing, sent a letter to at least three providers of VoIP directing them to comply with state regulations applicable to telecommunications carriers). Other states — including Alabama, Illinois, Michigan, Missouri, North Carolina, North Dakota, Ohio, Oregon, Virginia, and Washington — are investigating whether to take similar action, either on their own initiative or at the request of a specific party. See Alan Breznick, *States Weigh Regulating VoIP As Traditional Phone Service*, Cable Datacom News (Oct. 1, 2003); Peter Lewis, *Rules for Internet telephony challenge regulators; Is it telecommunications or information services?*, Seattle Times, at C1 (Oct. 13, 2003) (describing recent proceedings initiated in Washington state and Oregon); Order Establishing Case, *Study of*

innovation and investment in IP-enabled services by raising the specter of 51 different schemes of common carrier regulation over a class of services that, until now, has always been understood to be unregulated. The Commission's longstanding guarantee of a regulation-free zone for the Internet has been an important stimulus for its explosive growth and transformative effects on the world economy. The Commission would threaten both that legacy and the enormous economic benefits of regulatory certainty if it suggested the potential for state common carrier regulation for IP-enabled services.

In sum, as in the *Pulver Declaratory Ruling*, the Commission should confirm that it “ha[s] the authority to act in this area if states promulgate regulations applicable to [an IP-enabled] service that are inconsistent with its current nonregulated status.”^{104/} While states may validly play a role in applying some forms of non-communications-specific regulation — for example, by exercising general authority under existing state consumer protection statutes — even that involvement should occur within a predominantly federal framework. The Commission should take the lead in setting the basic principles and rules, with the states' input.

Voice over Internet Protocol, Case No. TW-2004-0324, at 1, 3 (Mo. Pub. Serv. Comm'n Feb. 3, 2004) (opening case to further the state commission's knowledge of VoIP technology and to assist in its preparation of comments to be filed with the Commission); Gayle Kansagor, *VoIP Debate Moves to North Dakota*, Telecommunications Reports Daily (Dec. 8, 2003). Colorado, Pennsylvania, and Texas have suspended similar proceedings in light of the Commission's issuance of the *NPRM*. See Order Closing Docket, *Investigation Into Voice over Internet Protocol (VoIP) Services*, Docket No. 03M-220T, ¶ 3 (Colo. Pub. Utils. Comm'n Dec. 17, 2003); Motion of Commissioner Glen R. Thomas, *Investigation into Voice over Internet Protocol as a Jurisdictional Service*, Docket No. M-00031707, at 2 (Pa. Pub. Utils. Comm'n Apr. 15, 2004); Order Addressing Threshold Issues and Motion to Dismiss, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821, at 7 (Tex. Pub. Utils. Comm'n Apr. 16, 2004).

^{104/} *Pulver Declaratory Ruling* at 3318-19 ¶ 18.

IV. CLASSIFYING IP-ENABLED SERVICES AS TITLE I INFORMATION SERVICES WOULD IN NO WAY DISTURB THE COMMISSION’S TITLE II NON-CARRIER-SPECIFIC AUTHORITY AND TITLE I ANCILLARY JURISDICTION TO ADDRESS IMPORTANT PUBLIC POLICY CONCERNS IMPLICATED BY SUCH SERVICES.

Despite the competitive nature of the market for IP-enabled services, the growing use of those services — especially as a next-generation replacement for existing legacy voice services — might still raise certain public policy concerns. For example, pressing concerns already have been raised concerning what compensation obligations providers of such services have when they use the PSTN to terminate or receive legacy telecommunications traffic and whether such providers have a right to use North American Numbering Plan (“NANP”) resources. And as these services proliferate, they are presenting public policy challenges, such as the availability of emergency services, disabilities access, and universal service.

As important as these issues are, they are not a reason for the Commission to refrain from determining that IP-enabled services are Title I information services and thus exempt from Title II legacy common carrier regulation. Such a determination would not prevent the Commission from addressing these and other similar issues, because the Commission would retain a broad range of authority to meet the regulatory challenges that will attend the continued growth of IP-enabled services. *First*, the Commission’s existing statutory authority over common carrier services will often suffice to address issues peculiar to the use of PSTN-based services in connection with IP-enabled services. *Second*, several provisions of Title II authorize the Commission to regulate non-common carrier services. The Commission may employ this so-called “Title II non-carrier-specific jurisdiction” to regulate many aspects of IP-enabled services regardless of how they are characterized. And *third*, the Commission may fill any remaining regulatory gaps with its Title I ancillary jurisdiction.

As discussed below, the Commission should actively exercise all such authority as necessary in the near term to craft appropriate rules to govern the intercarrier compensation obligations and numbering rules applicable to IP-enabled service providers. Other issues, like emergency services, may also merit the Commission's concern in the future. The Commission should clearly establish its jurisdiction in this arena, and its authority to implement rules if and as required. This is not to say, however, that the Commission should take action regarding these issues now. The Commission should be careful not to overregulate; where there is evidence that the industry already has begun to address public policy concerns, it may be sufficient for the Commission to monitor developments and support voluntary action.

A. The Commission's Existing Statutory Authority Over Common Carrier Services Is Sufficient to Reach Some Concerns Relating to IP-Enabled Services.

In some cases, the Commission's established statutory authority over common carrier services would plainly reach the most pressing issues that are raised by IP-enabled services, even once they are properly classified as information services. As a preliminary matter, for example, a finding that IP-enabled services are information services would leave undisturbed the Commission's Title II authority over underlying legacy common carrier facilities and services that are used today for PSTN-based telecommunications, even if those facilities and services can also be used for IP-enabled services. Preserving appropriate access to basic legacy facilities and services provides ample assurance that all providers will have an equal opportunity to offer facilities-based IP-enabled services, as they have had since the *Computer II* obligations were first put in place. The market for the IP-enabled technology that can be used in connection with the basic transmission services or facilities to which competitors would still have access is highly competitive.

The Commission's existing authority over common carriers also addresses other concerns that surround IP-enabled services, particularly the need to clarify the intercarrier compensation obligations that apply to IP-enabled services that send traffic to or receive traffic from the PSTN.^{105/} The Commission has express authority under sections 201 and 251(g) of the Act to address the rates that LECs may charge and that other entities are obligated to pay for access to the PSTN. And such authority extends to the obligations of *any* entity that accesses the PSTN to send or receive interstate traffic, regardless of whether that carrier is a common carrier. For example, as discussed below, there is no question that the Commission's Title II authority over access charges authorizes the Commission to address the access charge obligations of information service providers. Thus, the Commission's existing Title II authority over legacy common carrier access services provide the Commission with all the authority it requires to address the pressing intercarrier compensation question presented by IP-enabled services.

B. The Commission's Title II Non-Carrier-Specific Jurisdiction Is Sufficient to Address Many Regulatory Concerns with Respect to IP-Enabled Services.

Several provisions in Title II empower the Commission to regulate certain elements of communications service regardless of how the provider is classified. This Title II non-carrier-specific jurisdiction relates to *non-common carrier* issues — that is, those unrelated to the terms and conditions on which a provider offers service to the public. The Commission's jurisdiction under these statutory provisions is not limited to providers of telecommunications services. This authority will in many cases be sufficient for the Commission to address key issues relating to IP-enabled services, notwithstanding their regulatory classification.

^{105/} See *infra* section VI.A.

For example, the Commission has long-established, exclusive statutory authority under section 251(e) over numbering resources. The Communications Act does not limit the assignment of numbers to providers of telecommunications services. The Commission can exercise its powers to preclude or permit the use of numbers by *any* type of provider, regardless of the provider’s classification.^{106/} Indeed, section 251(e) contains no reference whatsoever to a carrier of any type, instead granting the Commission authority over the entity that the Commission creates or designates “to administer telecommunications numbering and to make such numbers available on an equitable basis.”^{107/} This authority therefore gives the Commission all the power it needs to address how IP-based service providers, for example, should obtain and use numbering resources.

The same is true of universal service. Section 254 of the Act provides on its face that the Commission’s express authority over universal service under section 254 is not limited to telecommunications service providers: “Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.”^{108/} Thus, the statute empowers the Commission to craft new contribution requirements and to assess at least some types of IP-enabled service providers for contributions; this will allow the Commission to respond to the challenge of traffic migrating from the PSTN to the IP platform.^{109/}

The Commission’s disability access authority under Title II likewise is not limited to common carriers. Specifically, section 255 requires that “manufacturer[s] of

^{106/} See *infra* section VI.B.

^{107/} 47 U.S.C. § 251(e)(1).

^{108/} *Id.* § 254(d).

^{109/} See *infra* section VI.E.

telecommunications equipment or customer premises equipment . . . ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities.”^{110/} This, in fact, obligates the Commission to address disability access issues for the provision of the equipment underlying IP-enabled services, which obviously is not a common carrier activity.

C. The Commission Also Has Ancillary Jurisdiction to Address Any Relevant Policy Concerns That Are Not Entirely Within the Commission’s Title II Jurisdiction Over Non-Common Carrier Services and Activities.

Finally, the Commission has ancillary jurisdiction to fill in any gaps in its statutory authority and to address any remaining public policy issues raised by IP-enabled services, especially those that interconnect with the PSTN and are designed to replace, complement, or improve on legacy services. The Commission has broad authority to “perform any and all acts, make such rules and regulations, and issue such orders not inconsistent with [the] Act, as may be necessary in the execution of its functions.”^{111/} And as the courts and the Commission have long recognized, the Commission’s functions are not limited to those specified in the substantive Titles of the Act (II, III, and VI), but include the general duty under Title I of the Act to “make available, so far as possible . . . a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”^{112/} The Commission thus has jurisdiction under the “general jurisdictional grant in Title I of the Communications Act” to adopt rules and regulations that are not clearly required under Titles II-VI, so long as the

^{110/} 47 U.S.C. § 255(b).

^{111/} *Id.* § 154(i).

^{112/} *Id.* § 151.

“assertion of jurisdiction is ‘reasonably ancillary to the effective performance of the Commission’s various responsibilities.’”^{113/}

The Commission has ancillary jurisdiction to address the public policy concerns surrounding the increasing deployment of IP-enabled services. First, the Commission has regularly found that information services are “communications by wire or radio” and thus “are subject to our jurisdiction under Title I of the Communications Act.”^{114/} As IP-enabled services and platforms proliferate and increasingly replace and draw traffic from legacy services and the PSTN, they will become a critical link in “Nationwide . . . communications,” and they also will have a direct effect on the quality and sustainability of the PSTN. The Commission’s ancillary jurisdiction will allow its regulations to keep pace with this change and ensure the Commission’s continuing ability to promote the policy goals of the Communications Act.^{115/}

Indeed, the Commission has a long history of using its ancillary authority to regulate new services that slip between the cracks of the Act’s substantive Titles yet compete with and replace

^{113/} Report and Order and Further Notice of Proposed Rulemaking, *Digital Broadcast Content Protection*, 18 FCC Rcd 23550, 23563 ¶ 29 (2003) (“*Digital Broadcast Content Order*”) (quoting *Southwestern Cable*, 392 U.S. at 178) (footnote omitted).

^{114/} See, e.g., Report and Order and Further Notice of Inquiry, *Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, 16 FCC Rcd 6417, 6455-62 ¶¶ 93-108 (1999) (“*Disability Access Order*”) (using ancillary authority to regulate providers of voicemail and interactive menu services); *Computer & Communications Indus. Ass’n*, 693 F.2d 198 (upholding Commission’s assertion of ancillary jurisdiction over enhanced services); see also Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, 6610 ¶ 148 (2001) (concluding that IM services are communications by wire and/or radio and thus that “new IM-based services . . . are subject to our jurisdiction under Title I of the Communications Act”); 47 U.S.C. § 152(a); *id.* § 151 (defining purpose of the Communications Act to “make available, so far as possible . . . a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”).

^{115/} See *Southwestern Cable*, 392 U.S. at 178; *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (“*Midwest Video I*”).

existing services already regulated under one of those Titles. Over thirty years ago, the Commission exercised its general Title I authority to regulate the relatively new cable industry, even though the Act did not explicitly give the Commission authority to do so. In *United States v. Southwestern Cable Co.*, the Supreme Court affirmed this assertion of jurisdiction, holding that the Commission's broad duty to develop a national system for local television broadcasting, coupled with its authority over "all interstate . . . communication by wire or radio," permitted its regulation of cable systems.^{116/} The Court recognized that cable systems were increasingly used to import distant programming, rather than simply to extend the range of local antennae.^{117/} In other words, cable services would substitute for, rather than merely enhance, local programming, just as IP-enabled services now promise to replace and draw traffic from the PSTN. The Court found reasonable the Commission's conclusion that cable programming could damage local stations, possibly to the point that the benefits of a local broadcasting system would be lost altogether.^{118/} The Commission similarly feared that by "dividing the available audiences and revenues," cable service would exacerbate financial difficulties faced by UHF and educational television.^{119/} Based on these conclusions, the Court agreed that "the Commission cannot discharge its overall responsibilities without authority over this important aspect of television service."^{120/}

^{116/} *Southwestern Cable*, 392 U.S. at 178.

^{117/} *Id.* at 163.

^{118/} *Id.* at 175.

^{119/} *Id.* at 176.

^{120/} *Id.* at 177 (quotation and citation omitted); see also *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706-07 (1979) ("*Midwest Video II*") ("[In *Southwestern Cable*] regulation was imperative to prevent interference with the Commission's work in the broadcasting area."); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 734 (2d Cir. 1973) ("[In *Southwestern Cable*] the authority of the FCC . . . was based on the need to control the growth of community antenna systems in order

The Commission's ancillary jurisdiction is also a recognized tool for the Commission to affirmatively promote the goals of the Act when confronted by new services that do not fall squarely within the Act's existing provisions. The Supreme Court recognized this aspect of the Commission's authority when it upheld further regulations of the cable industry in *United States v. Midwest Video Corporation*.^{121/} The Court "agree[d] with the Commission that its concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies."^{122/} Indeed, there is no stopping point between promoting statutory policies and preventing adverse effects, for "the avoidance of adverse effects is itself the furtherance of statutory policies."^{123/} Several years later, the Court reaffirmed this core holding.^{124/}

The courts have upheld the Commission's exercise of its Title I authority in several additional contexts where regulation of new services that fall outside of one of the Act's substantive Titles has been deemed a necessary component of the Commission's oversight of

that the Commission might accomplish its broad responsibility of orderly development of an appropriate system of local television broadcasting.").

^{121/} These regulations prohibited cable systems having 3,500 or more subscribers from carrying broadcast station signals unless they also operated as a local outlet by cablecasting and had facilities available for local production and presentation of programming. *See Midwest Video I*, 406 U.S. at 653.

^{122/} *Id.* at 664 (quotation omitted) (plurality opinion); *see also id.* at 667 ("In short, the regulatory authority asserted by the Commission in 1966 and generally sustained by this Court in *Southwestern* was authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission has been assigned jurisdiction over broadcasting."); *id.* at 675-76 (Burger, C.J., concurring in the judgment).

^{123/} *Id.*

^{124/} *Midwest Video II*, 440 U.S. at 700 ("Our holding in *Midwest Video* sustained the Commission's authority to regulate cable television with a purpose affirmatively to promote goals pursued in the regulation of television broadcasting . . .").

services or principles within those Titles.^{125/} As the courts have noted, “Congress sought ‘to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.’”^{126/} Likewise, the Commission has repeatedly recognized its authority to use its ancillary jurisdiction to promote the goals served by the Communications Act.^{127/} And the Commission has specifically exercised those “elastic powers” to regulate information services where it has found that doing so is ancillary to its duty to advance the public interest in the provision of telecommunications services under Title II.^{128/}

By contrast, in the isolated circumstances in which courts have *invalidated* the Commission’s invocation of its Title I authority, they have done so primarily because the Commission had exercised that authority to adopt rules that were in significant *tension* with substantive principles embodied in the Communications Act or in the First Amendment.^{129/} But

^{125/} See, e.g., *Computer & Communications Indus. Ass’n*, 693 F.2d at 213 (upholding Commission’s conclusion that regulation of enhanced services was necessary to prevent AT&T from burdening customers of regulated service with costs of competitive services); *GTE Serv. Corp.*, 474 F.2d at 731 (approving ancillary jurisdiction over common carrier’s entry into computer services market because it is an area “intimately related to the communications industry . . . where such activities may substantially affect the efficient provision of reasonably priced communications service”).

^{126/} *Computer & Communications Indus. Ass’n*, 693 F.2d at 213 (quoting *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846, 853 (5th Cir. 1971)).

^{127/} *Digital Broadcast Content Order* at 23565 ¶ 31 (“Here, the record shows that creation of a redistribution control protection system . . . is essential for the Commission to fulfill its responsibilities under the Communications Act and achieve long-established regulatory goals in the field of television broadcasting.”).

^{128/} *Disability Access Order* at 6455 ¶ 93 (“[I]n order for us to carry out meaningfully the accessibility requirements of section 255, requirements comparable to those under section 255 should apply to two information services that are critical to making telecommunications accessible and usable by people with disabilities.”); *Computer & Communications Indus. Ass’n*, 693 F.2d at 213 (upholding authority to regulate enhanced services).

^{129/} See *Midwest Video II*, 440 U.S. at 700-09 (invalidating FCC attempt to impose on cable companies under Title I the type of common carrier regulation that the Act would prohibit if the regulated parties had been broadcasters rather than cable companies); *Motion Picture Ass’n of*

this inherent limitation makes the Commission’s ancillary jurisdiction an especially appropriate tool for regulating IP-enabled services. The Internet owes much of its robust growth to the Commission’s light regulatory touch to date. By restricting its interventions in the field of IP-enabled services to those necessary to implement express statutory policies, the Commission will help fulfill Congress’s policy of “preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation” while retaining the flexibility to act when necessary.^{130/}

Here, the Commission’s assertion of jurisdiction to address the public policy concerns surrounding IP-enabled services would not remotely thwart, and is indeed necessary to promote, the substantive policy goals of the Communications Act. For example, Congress has specifically endorsed the Commission’s intervention in the market to protect access to emergency communications services (911),^{131/} and to ensure that service is accessible to people with disabilities.^{132/} Thus, any exercise of Commission authority under Title I to discharge these and other similar functions with respect to information service providers (or at least a subset of such providers, as SBC explains below) would be directly ancillary to the express statutory authority already afforded by Congress in other substantive provisions of the Act. So long as the Commission acts in direct furtherance of promoting or protecting the goals that Congress set forth in these provisions, the Commission’s exercise of its Title I authority would be reasonably ancillary to fulfilling its statutory responsibilities.

Am. v. FCC, 309 F.3d 796 (D.C. Cir. 2002) (invalidating FCC invocation of Title I to impose constitutionally problematic “video description” rules).

^{130/} 47 U.S.C. § 230(b)(2).

^{131/} *Id.* § 615.

^{132/} *Id.* § 255.

V. TO THE EXTENT THE COMMISSION DETERMINES THAT SOME REGULATION OF IP-ENABLED SERVICES IS WARRANTED, IT SHOULD LIMIT THAT REGULATION, AT LEAST INITIALLY, TO THOSE IP-ENABLED SERVICES THAT CONNECT WITH THE PSTN.

Even if the Commission determines that some regulation is in order to address certain policy concerns, it would not make sense simply to apply such regulations to all IP-enabled services across the board. IP-enabled services do not all raise the same public policy concerns, and, as the Commission has recognized, “any regulations [should be] applied to such services” only in “those cases in which they are appropriate.”^{133/} It therefore makes sense, as the Commission notes, to “differentiate among various IP-enabled services,” so that only those services that actually implicate the relevant policy issues are subject to regulation. Such an approach will ensure that, as Congress mandated, IP-enabled services “remain [otherwise] unregulated.”^{134/} And it will also ensure that the Commission’s ancillary authority, where exercised, is applied in a narrowly-tailored manner to serve valid public interest goals under the Communications Act.

Whether an IP-enabled service interconnects with the PSTN should be the minimum, “gating” criterion (at least for the foreseeable future) for determining whether a service should be subject to regulations that address public policy concerns. Such “interconnected” services are part of the seamless and ubiquitous communications network that allows all citizens of this country to communicate with one another (and across the globe). As such, they are most likely to raise issues similar to those raised by legacy circuit-switched services, which make up the bulk of that communications network today. And the Commission’s authority to regulate is at its apex where IP-enabled services interconnect with the PSTN because Congress has directly authorized

^{133/} *NPRM* ¶ 35.

^{134/} *Id.*

the Commission under both Titles I and II to protect the reliability, affordability, and accessibility of this country's communications network, and to ensure that the network is available as a tool for safeguarding life and property.^{135/}

IP-enabled services that are not connected to the PSTN, however, are not designed to operate as part of the nation's primary, open communications network. Such "closed" services allow communications only among a specific subset of users. Subscribers who opt for such services recognize that they are "off" the country's primary, interconnected communications network. "Closed" IP-enabled services do not, and are not designed to, meet all of a typical subscriber's communications needs. Indeed, in some cases — *e.g.*, Microsoft's X-Box Live — the IP-enabled service may allow "communications" among subscribers only for limited purposes, as an adjunct to something else — *e.g.*, playing video games. Subscribers' expectations with respect to such "closed" and defined services would be very different from those of an end user on the PSTN or a subscriber to a VOIP service connected with the PSTN, both of whom expect to be able to communicate with anyone, for any reason. The public policy issues — if any — associated with such "closed" services, and the Commission's interest in regulating them (and authority to do so), generally would be extremely limited. If the landscape shifts in the future, and other types of services become more ubiquitous and are used to satisfy consumers' basic communications needs in connection with or as a replacement for PSTN-based communications, the Commission can and should revisit these concerns as they apply to such services.

PSTN-connectedness therefore should be a necessary criterion for the application of any Commission public policy-based regulations. But it may not be a sufficient criterion in all cases.

^{135/} See, *e.g.*, 47 U.S.C. §§ 151, 254, 255.

The Commission should adopt additional criteria where necessary to tailor the regulatory requirement narrowly to the services that trigger the concern. For example, not all IP-enabled services that interconnect with the PSTN may present similar emergency calling concerns. It is most important to ensure that IP-enabled services that are used for *voice* applications offer 911 calling capabilities; this concern would not be present with a data-only service, even if connected to the PSTN. As the Commission has recognized in another context, consumers are likely to have an expectation that a communications service will serve as an emergency calling tool if it not only is interconnected with the PSTN, but also offers “real-time, two-way voice service.”^{136/} The Commission should therefore adopt “voice capabilities” as an additional criterion for the application of any emergency calling related rules. In other cases — *e.g.*, the application of any numbering or number portability rules — the use of NANP numbers would be an appropriate necessary criterion.^{137/}

Using the PSTN interconnection criterion as an initial cut-off for whether a service might be regulated offers a bright-line, easily implemented test that sidesteps the quagmire that would result from the use of the alternative criteria suggested in the *NPRM*. For example, functional equivalence or substitutability, two tests mentioned by the *NPRM*, are overly subjective and could be over- or underinclusive. Whether a particular VOIP service is “functionally equivalent” to or substitutable for traditional voice service, for example, is not a straightforward question. Most VoIP services offer far *more* functionality than traditional voice. On the other hand, some VoIP services provide voice, yet are not useful for calling all other voice customers, as in the

^{136/} Memorandum Opinion and Order, *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 18 FCC Rcd 25340, 25347 ¶¶ 18-19 (2003) (“*E911 Scope Order*”).

^{137/} See *infra* section VI for a full discussion of the appropriate criteria.

case of Pulver's service. Whether the services are "equivalent" or "substitutable" therefore requires additional definition of what the relevant criteria will be; otherwise, the test will be: "I know it when I see it." The PSTN-connectivity test is a far more objective approach.

Further, basing any regulation on the simple (initial) test of whether a service interconnects with the PSTN presents an appropriate alternative to determining whether to regulate IP services, functionalities, or facilities based on "layers" — physical (or "facility"), logical (or "protocol"), applications, and content.^{138/} The layered model is, at bottom, an engineering concept that does not readily translate into a regulatory paradigm for the IP world. There is no consensus about how to define the "layers" of Internet-related communications for regulatory purposes or, for that matter, even for engineering purposes. For example, information theorists have often described the layered structure of data communications using the Open Systems Interconnection ("OSI") model, which identifies seven layers of functionality, while network engineers routinely depart from the specifics of that model.^{139/} And there is likewise no consensus about how to characterize certain services or facilities, such as ATM switching, within any chosen layering hierarchy. Finally, no matter what layering model might be chosen, the layers themselves fluctuate over time: for example, new generations of IP functionality can be said to occupy both the first and second layers of the traditional layered model.^{140/} All of these uncertainties could be expected to give rise to an unstable and contentious regulatory regime.

^{138/} NPRM ¶ 37.

^{139/} See, e.g., Joshua L. Mindel, *Refinements of a Layered Model for Telecommunications Policy*, 1 J. Telecomm. & High Tech. L. 69, 71 (2002) (stating that the layered approach "can be plagued by numerous shortcomings").

^{140/} See, e.g., George Gilder, *Testimony for Telecommunications Policy: A Look Ahead* (Senate Committee Hearing Apr. 28, 2004) (describing an "all-optical network" in which fixed wavelengths of light "can function as both the physical and logical layers," because the intelligence that routes the message "is embedded in the path" itself).

Moreover, as MCI's white paper reveals,^{141/} proponents of a layering approach often begin with the obsolete presumption that legacy incumbent providers have market power on the physical transmission layer and must demonstrate a basis to avoid regulation that otherwise would automatically apply. That presumption is flatly wrong, as SBC discusses below, and SBC's approach is far more likely to help the Commission address the IP environment through first principles, undistorted by yesterday's regulatory and market realities.

Even if the Commission ultimately were to choose a layered model, the end result ultimately should be the same. There is no basis for regulation of any entity's IP services or IP networks because no provider is dominant at any layer. Thus, wireline carriers should be subject to no special regulation in the IP sphere, notwithstanding MCI's suggestion to the contrary.^{142/} While MCI has advanced the mistaken premise that wireline broadband providers are dominant at the physical layer, cable operators are in fact the leading providers of residential and small business broadband service and control approximately *two-thirds* of all high-speed lines provided to mass-market customers.^{143/} And the availability and use of alternative broadband technologies — such as 3G mobile wireless, fixed wireless, BPL, and satellite — is steadily

^{141/} See Richard S. Whitt, "A Horizontal Leap Forward: Formulating A New Public Policy Framework Based On the Network Layers Model" (MCI Public Policy Paper Mar. 2004).

^{142/} See *id.*

^{143/} See VoIP Fact Report at A-1 (stating that cable companies control "more than *two-thirds* of all high-speed lines provided to residential and small-business customers" and "more than 83 percent of the most rapidly growing segment of mass-market broadband lines"); K. Burney, In-Stat/MDR, *The Data Nation: Wireline Data Services Spending and Broadband Usage in the US Business Market; Part Three: Small Businesses (5 to 99 Employees)* (Dec. 2003); see also *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428-29 (2002) ("*USTA I*") (invalidating line-sharing mandate in light of "the robust competition, and the dominance of cable, in the broadband market"); *USTA II*, 359 F.3d at 585 (upholding elimination of broadband unbundling obligations because (inter alia) "intermodal competition from cable ensures the persistence of substantial competition in broadband").

increasing.^{144/} Likewise, traditional interexchange carriers such as AT&T and MCI control an overwhelming share of the enterprise business market.^{145/} Their advocacy for disproportionately heavy regulation of ILECs should be seen for what it is: self-interested protectionism. Nor, of course, are wireline providers dominant at any applications layer. To the contrary, as discussed in SBC's pending petitions, the market for IP-enabled services is subject to open and robust competition at all layers.^{146/} Thus, properly understood, the layered model actually cuts strongly in favor of *unregulation* of wireline providers — and certainly of less regulation for them than for the cable and other providers that currently lead the field in their respective markets.

VI. THE COMMISSION SHOULD PROMPTLY ADDRESS INTERCARRIER COMPENSATION AND NUMBERING ISSUES AND THEN ADDRESS OTHER IMPORTANT POLICY CONCERNS RAISED BY IP-ENABLED SERVICES.

As noted above, IP-enabled services raise certain legitimate, and in some cases pressing, public policy concerns. The Commission has clear authority to address those issues by applying or crafting appropriate rules to the extent necessary. In some cases, it should exercise that authority; in others, it should simply affirm that it has the authority to apply or craft such rules in the future should the need arise.

^{144/} See VoIP Fact Report at A-8 (“The Commission has already recognized that, in addition to cable and DSL, there are numerous additional platforms and technologies already competing in or poised to enter the broadband mass market, including power lines, fixed wireless, 3G mobile wireless, and satellite.”); see generally *id.* A-8 to A-19 (describing broadband offerings by alternative technologies).

^{145/} See *id.* at A-19 (describing a report showing “that it is AT&T and the other large interexchange carriers — not the ILECs — that dominate” the market for large business customers); *id.* at 28 (“Competing carriers lead in the provision of IP-based services to enterprise customers, just as they do in the provision of old packet-switched services like ATM and Frame Relay.”).

^{146/} See SBC Declaratory Ruling Petition at 11-14.

As discussed below, the most pressing substantive concerns that arise in connection with IP-enabled services (in addition to the jurisdiction and classification issues discussed above) are (1) the uncertainty concerning the intercarrier compensation obligations of IP-enabled service providers that send traffic onto or receive traffic from the PSTN, and (2) the extent to which IP-enabled service providers should be entitled to make use of NANP numbering resources, and what rules should apply if they do. Proper and timely resolution of these two issues is essential to creating an equitable and rational framework for efficient investment in, and removing barriers to the further deployment of, IP-enabled services. Intercarrier compensation as it applies to IP-enabled services is currently fraught with uncertainty, which some providers have exploited as an opportunity for regulatory arbitrage. The confusion is destabilizing and discourages efficient investment, and the Commission therefore should swiftly pronounce that — until the agency adopts a unified intercarrier compensation regime — IP-enabled service providers must pay interstate access charges when they send traffic to or receive traffic from the PSTN. At the same time, the Commission’s numbering rules, which restrict VoIP providers’ direct access to numbering resources, are unnecessarily limiting technological and service innovation without any countervailing benefit. The Commission should modify its rules to permit VoIP providers (and other IP-enabled service providers) direct access to numbering resources as long as they meet criteria demonstrating their intent to provide service.

The Commission should act on these two imperative issues immediately, preferably by the end of this year; because these issues are discrete, it need not await resolution of all other public policy issues that are before it to decide these issues. Nonetheless, these other public policy issues also deserve the Commission’s prompt attention. One of the more pressing of these areas is public safety as it relates to the emergency calling capabilities of IP-enabled services.